Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

85 pp

QUESTIONS PRESENTED

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") provides that when a civil suit is brought against a federal employee, the United States shall be substituted as the defendant in the place of the individual defendant if the individual was an employee of the government acting within the scope of his employment at the time of the events in question. The substitution immunizes the individual from all claims except those brought for a violation of the United States Constitution (so-called *Bivens* claims) or of a federal statute. The questions presented are:

1. Whether an individual defendant may appeal immediately, prior to discovery, the denial of his motion to substitute the United States pursuant to the Westfall Act where the plaintiff's factual allegations were deemed true and the Attorney General certified that the individual defendant was an employee of the government acting within the scope of his employment.

2. Whether an individual defendant in a *Bivens* case who raises a qualified immunity defense may appeal immediately, prior to discovery, the denial of his Rule 12(b)(6) motion to dismiss, given that, because the district court must have taken the plaintiff's factual allegations as true, there cannot be a factual dispute that would bar immediate appeal under *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

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PETITION FOR A WRIT OF CERTIORARI

Francisco Sosa and Antonio Garate-Bustamante respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit dismissing their appeals for lack of jurisdiction.

OPINIONS BELOW

The orders of the court of appeals (App. 1a-2a) are unpublished. The opinion and order of the district court (App. 3a-50a) is unpublished.

JURISDICTION

The court of appeals entered its order dismissing the petitioners' appeals on December 19, 1995. Following the issuance of this Court's decision in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), the petitioners moved for leave to file an out-of-time motion for reconsideration and reinstatement of their appeals in light of the new decision. The court of appeals accepted the petitioners' motion for filing, but denied the motion for reconsideration on May 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Because the court of appeals considered petitioners' motion for reconsideration on the merits, the time for filing a petition for certiorari under Supreme Court Rule 13 began to run upon entry of the order denying the motion for reconsideration. *Pfister v. Northern Illinois Fin. Corp.*, 317 U.S. 144, 149-50 (1942); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940).

STATUTORY PROVISIONS INVOLVED

The petitioners moved for substitution of the United States in the district court pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563 (codified in pertinent part at 28 U.S.C. § 2679), and the district court issued a memorandum opinion denying the motion. The Act is set out in the Appendix at 51a-59a. The petitioners' appeals were dismissed on the grounds that the court of appeals did not have jurisdiction under 28 U.S.C. § 1291. Section 1291 states in pertinent part that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT

In early 1990, respondent Humberto Alvarez-Machain was under indictment for the March 1985 torture and

murder of DEA Special Agent Enrique Camarena-Salazar.[1] After the Mexican government refused the United States' requests to apprehend and extradite respondent, the DEA worked with petitioner Antonio Garate-Bustamante, a DEA informant, to assemble a team to arrest respondent and return him to the United States for prosecution. Among those recruited for the arrest operation was petitioner Francisco Sosa.

On April 2, 1990, the DEA's team arrested respondent in Guadalajara and subsequently transported him to El Paso, Texas, where he was temporarily incarcerated before being transferred to Los Angeles. Respondent ultimately was granted a directed verdict of acquittal at his criminal trial, and he thereafter returned to Mexico.

After his acquittal, respondent filed this civil suit against petitioners Sosa and Garate, the United States, and other individuals involved in the planning and execution of the arrest operation, seeking damages based on the events of his arrest, transportation, and detention in Mexico and the United States. The eleven-count amended complaint charged the defendants with kidnapping, torture, "cruel and inhuman and degrading treatment or punishment," "prolonged arbitrary detention," violations of the Fourth, Fifth, and Eighth Amendemnts to the United States Constitution, assault and battery, false imprisonment, intentional and negligent infliction of emotional distress, and false arrest.[2]

The Attorney General issued a certification pursuant to 28 U.S.C. § 2679(d) attesting that petitioners Sosa and Garate were employees of the United States acting

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[1] The facts in this Statement are taken from respondent's complaint and from the opinion in *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

[2] The district court had jurisdiction over respondent's complaint under 28 U.S.C. § 1331.

within the scope of their employment at the time of the events alleged in the complaint. The United States, joined by Sosa and Garate, then moved under the Westfall Act to substitute the United States as the defendant in place of Sosa and Garate for all of respondent's claims based on international law, federal common law, or state law. The United States argued that, based on the allegations of respondent's complaint, the Attorney General's certification, and the findings of Judge Rafeedie in *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992), there was no basis for disputing that Sosa and Garate were employees of the government acting within the scope of their employment during the events in question.

Sosa and Garate also moved separately to dismiss the remainder of respondent's claims not encompassed in the motion to substitute. With respect to respondent's *Bivens* claims, Sosa and Garate argued that they were entitled to qualified immunity because respondent had not alleged a violation of clearly established law, and that respondent could not in any event maintain a *Bivens* action based on conduct occurring in Mexico.

The district court denied the motion to substitute the United States in place of Sosa and Garate under the Westfall Act. It held that if Sosa and Garate were independent contractors, rather than agents, they would not be considered "employees of the government" for purposes of substitution. The court held that respondent therefore was entitled to discovery on the question of Sosa's and Garate's employment relationships with the United States, and stated that an evidentiary hearing might be necessary to resolve the matter. (App. 27a-30a.) The court did not reach the question of whether Sosa and Garate had acted within the scope of their employment.

The district court also denied Sosa's and Garate's motions to dismiss on the basis of qualified immunity. The court interpreted Ninth Circuit precedent to permit only individuals with a formal employment relationship with the government to assert a qualified immunity defense in a *Bivens* suit, and reasoned that it was necessary to resolve the question of whether Sosa and Garate were formal employees of the government, as opposed to independent contractors, before the court could consider their qualified immunity defenses. The district court therefore proceeded to address Sosa's and Garate's motions to dismiss the constitutional claims on their merits, and held that as to those claims arising from events in Mexico, neither the Fourth nor Fifth Amendment applied extraterritorially to grant respondent a civil cause of action. However, although the complaint alleged no conduct by Sosa or Garate within the United States, the court held that "Garate and Sosa may be liable under *Bivens* for violations of the Fourth and Fifth Amendments after Alvarez entered the territory of the United States." As a result, the district court dismissed the *Bivens* claims against Sosa and Garate "only with respect to the alleged extraterritorial misconduct." (App. 37a.)

Sosa and Garate immediately appealed the district court's denial of their motion to substitute and the denial of their motions to dismiss on the basis of qualified immunity.[8] Respondent moved to dismiss those appeals for

[8] In total, five separate immediate appeals were taken from the district court's opinion and order. In addition to petitioners' appeals, four other individual defendants took an immediate appeal from the district court's refusal to grant them qualified immunity from respondent's *Bivens* claims. The United States was granted leave under 28 U.S.C. § 1292(b) to immediately appeal the district court's ruling on respondent's Federal Tort Claims Act claims. Lastly, respondent was also permitted to appeal immediately the district court's holdings that respondent could not assert a *Bivens* claim based on events occurring in Mexico and that the Torture Victim Protection Act, 28 U.S.C. § 1350 note, does not apply retroactively. Those three other appeals were consolidated for argument and have been taken under advisement by the Ninth Circuit.

lack of appellate jurisdiction. With respect to substitution, respondent argued that, pursuant to *Johnson v. Jones*, 115 S. Ct. 2151 (1995), the district court's ruling that it could not decide Sosa's and Garate's employment status without further factfinding was a nonfinal order that was not immediately appealable under the collateral order doctrine. Respondent relied on two cases from other circuits that had so held.[4] As to qualified immunity, respondent argued that, because Ninth Circuit precedent denied the qualified immunity defense to private parties, Sosa and Garate were not entitled to an immediate appeal of the district court's refusal to permit them to raise that defense.

In response, Sosa and Garate explained that *Johnson v. Jones* only barred an interlocutory appeal in that narrow circumstance where a qualified immunity defense is rejected at the summary judgment stage on the ground that a genuine issue of material fact precludes entry of judgment in the defendant's favor. Legal issues, such as whether the plaintiff had alleged a violation of clearly established law, remained immediately appealable following *Johnson*. Thus, the purely legal determination of Sosa's and Garate's entitlement to raise a qualified immunity defense on the facts as alleged by respondent was also appealable immediately. Concerning substitution, Sosa and Garate argued that the denial of their motion to substitute was immediately appealable under circuit precedent, and unaffected by *Johnson*, given that the motion-to-dismiss posture of the case precluded the presence of factual disputes; Sosa and Garate contended that they were entitled to substitution as a matter of law when respondent's allegations were accepted as true.

The Ninth Circuit granted respondent's motion to dismiss Sosa's and Garate's appeals on December 19, 1995 in a one-sentence unpublished order. (App. 2a.) With-

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[4] *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994); *Schrob v. Catterson*, 967 F.2d 929 (3d Cir. 1992).

out elaboration, the court cited *Johnson* and *Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987), in support of its ruling that it was without jurisdiction to consider the appeals.

On February 21, 1996, this Court issued its decision in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). In that case, the Court held that *Mitchell v. Forsyth*, 472 U.S. 511 (1985), permits an interlocutory appeal from the denial of a qualified immunity defense at *both* the motion-to-dismiss and summary-judgment stages of litigation, and that the reasoning of *Johnson v. Jones* was limited to its particular situation.

Sosa and Garate promptly moved for leave to file a motion for reconsideration out of time and for reinstatement of their appeals on the authority of *Behrens*. However, the Ninth Circuit refused to reinstate Sosa's and Garate's appeals. (App. 1a.) In another one-sentence unpublished order, it held that "the district court is not compelled initially to determine any *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) damages claim whether defendants are entitled to qualified immunity on basis of their version of facts which currently are subject to a genuine dispute. *See Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996)." *Id.*[5]

REASONS FOR GRANTING THE PETITION

The immunity provisions of the Westfall Act protect hundreds of federal employees who are sued in their individual capacities each year. As with qualified immunity, Westfall Act immunity provides not merely a defense to liability, but a complete immunity from suit as to those claims within its scope. These protections are lost if federal employees are forced to submit to discovery prior

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[5] **The Ninth Circuit's order is quoted above and reproduced in the Appendix exactly as it was issued.**

to being given the opportunity to appeal, even though their entitlement to substitution could be determined from the face of the pleadings and from a scope certification issued by the Attorney General. Those circuits that prohibit immediate appeal from the denial of a pleadings-based motion for substitution or motion to dismiss on the basis of qualified immunity are in conflict with the immunity analysis in *Behrens v. Pelletier* and earlier cases, which recognizes that, to be effective, immunity must protect federal employees from all the burdens of litigation, including discovery, and that an immediate appeal from an order requiring an employee to participate in such discovery is essential to enforce those protections.

I. THOSE CIRCUIT COURT DECISIONS THAT PROHIBIT PRE-DISCOVERY APPEALS IN WESTFALL ACT CASES ARE IN CONFLICT WITH THE IMMUNITY PRINCIPLES ENDORSED BY THIS COURT.

The immunity protecting federal employees from civil tort suits is designed to insulate them from the burdens and distractions of litigation, including those associated with pre-trial discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). "One of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Thus, before discovery may commence in cases where immunity is raised as a defense, the plaintiff's complaint must sufficiently allege the elements necessary to overcome the defense. *Mitchell*, 472 U.S. at 526.

In *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), this Court held unequivocally that an order rejecting the defense of qualified immunity raised in a motion to dismiss is a final order subject to immediate appeal. *Id.* at 839. *Behrens* reiterated the holding in *Mitchell* that the denial of a motion to dismiss is "final" as to the defendant's right

to avoid discovery, and must be immediately appealable to protect adequately the defendant's immunity from suit. *Id.* at 839-40.

The *Behrens* rationale is equally applicable to Westfall Act immunity. Under the Westfall Act, a defendant is entitled to immunity from common-law tort suits if he or she was an employee of the government and was acting within the scope of employment at the time of the incident at issue. 28 U.S.C. § 2679(d). In that situation, the United States is substituted as the defendant in place of the individual employee, and the suit proceeds as a claim against the United States under the Federal Tort Claims Act (FTCA).[6]

The Ninth Circuit implicitly held that Sosa and Garate could not take an immediate appeal from the denial of their pleadings-based motion for substitution where the district court intended to revisit the issue following discovery and, if necessary, an evidentiary hearing. Because the Ninth Circuit provided no explanation for its decision, and therefore no grounds for meaningful review, this Court must look to those courts that have squarely considered this question in published decisions to evaluate the propriety of the Ninth Circuit's ruling.

Two circuit courts have directly considered this issue in published decisions, and both are in conflict with this

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[6] Before this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), a federal employee enjoyed immunity from common-law tort suits if he or she had been acting within the scope of employment at the time of the incident in question. *Westfall* imposed the additional requirement that the employee must have been exercising a "discretionary function" before immunity would attach. "Congress reacted quickly to delete the 'discretionary function' requirement, finding it an unwarranted judicial imposition, one that had 'created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.'" *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2232 (1995) (quoting § 2(a)(5) of the Westfall Act (App. 52a)).

Court's established immunity doctrine. In *Schrob v. Catterson*, 967 F.2d 929 (3d Cir. 1992), the district court had denied a motion to substitute without prejudice to its renewal following discovery, and the defendant immediately appealed. The Third Circuit dismissed the appeal, holding that, because the district court had denied the motion without prejudice, the finality prong of the three-part collateral order test under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), had not been satisfied, and that the order was therefore not "final" for purposes of 28 U.S.C. § 1291. The court rejected the argument, enunciated by this Court in *Mitchell* and subsequently reaffirmed in *Behrens*, that the order satisfied the finality requirement of *Cohen* because it required the employee to face litigation on the plaintiff's tort claims:

> To be sure, the policy underlying the grant of immunity extends to pretrial matters as well and, as the Court noted in *Mitchell*, "such pretrial matters as discovery are to be avoided *if possible* . . . ." However, the finality aspect of the collateral order doctrine is not satisfied by the conclusion that the district court's ruling conclusively determined the immunity issue to the extent that it requires the appellants to engage in such limited discovery proceedings. We can hardly hold otherwise, for a contrary conclusion would create a basis for immediate appeal from a denial of substitution pending even minimal discovery. As we have discussed above, even a federal employee entitled to immunity as a result of substitution under the Reform Act must submit to limited discovery where it is necessary for the district court to establish whether the employee acted within the scope of employment.

Id. at 938 (citation omitted). The Third Circuit erroneously concluded that some circumstances exist in which the denial of a motion to dismiss based on qualified immunity is not immediately appealable, and used that same reasoning to forbid a similar appeal from a motion to substitute. *See id.* at 939.

The Fourth Circuit also has held that a district court order denying substitution pending an evidentiary hearing is not immediately appealable. In *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994), the district court had initially granted substitution based on a scope certification issued by the Department of Justice, but later vacated that order, reinstated the employee as a defendant, and scheduled an evidentiary hearing on the grounds that it could not determine whether the employee's alleged conduct was within the scope of his employment "without further 'factual inquiry.'" *Id.* at 229. Following the hearing, the court denied substitution, remanded the case to state court, and the employee appealed.

The plaintiff moved to dismiss the appeal, claiming that by failing to appeal the district court's original order vacating the substitution and scheduling a hearing, the employee "forfeited his right to all appellate review of the district court's holding on the substitution issue" following the hearing. *Id.* at 230. The Fourth Circuit disagreed, holding that the earlier order did not satisfy the *Cohen* requirements for immediately appealable collateral orders. "The order does not meet the first—and most fundamental—requirement for appealability under *Cohen*, because it did not 'conclusively determine' the issue in dispute: whether [the employee] was entitled to have the United States substituted for him as defendant." *Id.* Relying on the Third Circuit's decision in *Schrob*, the court determined that "[s]uch a tentative and preliminary ruling on a disputed issue, which plainly holds open the prospect of reconsideration and alteration by the district court itself, is not sufficiently 'final' to be appealable under the collateral order doctrine." *Id.*[7]

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[7] The Fourth Circuit's reasoning in *Jamison* is arguably *dicta* because, as the court itself recognized in a footnote, a party with a right to take an immediate interlocutory appeal may decline to do so, without prejudice to later raising the same issues in an appeal from a subsequent order. *See* 14 F.3d at 231 n.11. Nonetheless, *Jamison* represents the Fourth Circuit's concurrence with the *Schrob* analysis as to the immediate appealability of such orders.

Although the Ninth Circuit's orders in this case make it virtually impossible to discern its reasoning on the substitution question, it appears that the Ninth Circuit follows a procedure for ruling on scope of employment certifications in Westfall Act cases similar to that adopted by *Schrob* and *Jamison*:

> [W]hen a district court is reviewing a certification question under the Westfall Act, it must identify and resolve disputed issues of fact necessary to its decision before entering its order. In doing so, it should hold such hearings as appropriate (including an evidentiary hearing if necessary), and make the findings necessary to bind the parties by its decision and enable them to appeal the certification decision if they deem an appeal necessary.

Arthur v. United States, 45 F.3d 292, 296 (9th Cir. 1995). Under this procedure, a federal employee apparently has no right to appeal until after the district court has conducted whatever discovery and evidentiary hearings it deems necessary. It appears that the panel in this case invoked this rule to deny immediate appeal to Sosa and Garate, whose motion to dismiss accepted the facts as alleged in the complaint. In doing so, the court of appeals assumed the existence of a factual dispute when, in this context, none exists.

The courts of appeals' rule denying immediate appeal from the denial of a motion for substitution based solely on the pleadings and the Attorney General's certification irreconcilably conflicts with this Court's holdings in *Mitchell* and *Behrens*. The position taken in *Schrob*, *Jamison*, and the Ninth Circuit's decision in this case ignores the fact that Westfall Act immunity, like qualified immunity, is an immunity from suit that is irrevocably lost if the federal employee is forced to submit to discovery and the related burdens associated with pretrial civil litigation. As *Behrens* emphasized,

> *Harlow* and *Mitchell* make clear that the [immunity] defense is meant to give government officials a right,

> not merely to avoid "standing trial," but also to avoid the burdens of "such *pretrial* matters as discovery . . . , as '[i]nquiries of this kind can be peculiarly disruptive of effective government.' " Whether or not a later summary-judgment motion is granted, denial of a motion to dismiss is conclusive as to this right.

Behrens, 116 S. Ct. at 839-40 (citations omitted). The *Behrens* Court considered the point "settled" that "this right is important enough to support an immediate appeal." *Id.* at 840. The court of appeals decisions refusing to permit a similar immediate appeal from the denial of Westfall Act immunity simply cannot be reconciled with this reasoning.

II. IMMEDIATE APPEAL PRIOR TO DISCOVERY IS ESSENTIAL TO PRESERVE WESTFALL ACT IMMUNITY

Qualified immunity and Westfall Act immunity work hand-in-hand at the pleading stage to eliminate baseless suits seeking to hold federal employees personally liable for nothing more than doing their jobs. As in this case, plaintiffs often use a "shotgun" approach to suits against federal employees, raising several constitutional and common-law tort claims in a single complaint. Qualified immunity and Westfall Act immunity together give federal employees a means to eliminate with a minimum of disruption all or most of those claims in a single motion to dismiss. Qualified immunity disposes of those constitutional tort claims that do not allege a violation of clearly established law, while the Westfall Act converts nearly all the common law tort claims into FTCA claims against the United States.

If the district court refuses to dismiss the case in its entirety as to the individual employee, *Behrens* makes clear that the employee may appeal immediately that portion of the district court's order denying his qualified immunity-based motion to dismiss the constitutional tort claims. It would be anomalous to permit the immediate

appeal of a denial of a motion to dismiss a *Bivens* claim but to bar an identical appeal from the denial of Westfall Act immunity.[8] Indeed, Westfall Act immunity should be guarded at least as zealously as is qualified immunity. In excluding constitutional tort claims from the coverage of the Westfall Act, Congress explained that while "[c]ommon law torts are the routine acts or omissions which occur daily in the course of business," a constitutional tort is "a more serious intrusion of the rights of an individual that merits special attention." H.R. Rep. No. 700, 100th Cong., 2d Sess. 6, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5950. Although this "special attention" ordinarily might warrant the adoption of a procedural regime that facilitated the pursuit of constitutional claims, *Behrens* and *Mitchell* hold that the importance of providing redress for such claims is outweighed by the need to protect federal employees from the burdens of defending meritless lawsuits. As a result, federal employees may take an immediate appeal from the denial of a motion to dismiss at the expense of delaying recovery to those plaintiffs with valid claims. If a right of immediate appeal is necessary to safeguard federal employees' immunity from constitutional claims that "merit[] special attention," then such an immediate appeal is surely required to protect employees' congressionally-mandated immunity from suit on "routine" tort claims.

As with qualified immunity, a pre-discovery Westfall Act immunity appeal qualifies as a "collateral order" under the *Cohen* test. First, where a district court rules

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[8] Interests of judicial economy would also be served by permitting immediate appeals from the denial of Westfall Act immunity where, as here, the employee is also appealing the denial of a qualified immunity motion. In the Ninth Circuit and elsewhere, the filing of an interlocutory appeal on qualified immunity stays further proceedings in the district court. *See, e.g., Hegarty v. Somerset County*, 25 F.3d 17, 18 (1st Cir. 1994); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). Immediate resolution of the substitution issue could substantially reduce the need for further litigation in the district court.

that a defendant claiming Westfall Act immunity must submit to discovery on whether he was an "employee of the government" or whether he acted within the scope of his employment, the immunity from suit conferred by the Westfall Act is irretrievably lost in the absence of an immediate appeal. Second, questions concerning the defendant's employment status or whether the alleged conduct, taken as true, fell within the scope of that employment are collateral to and separate from the merits of whether the conduct in fact occurred or what defenses the defendant may have. The substitution question at the motion-to-dismiss stage of a case presents a pure question of law: whether, based on the pleadings and, if present, the scope certification issued by the Attorney General, the individual defendant was, as a matter of law, an employee of the government acting within the scope of his employment at the time of the events in question. None of the concerns relating to fact-bound appeals identified in *Johnson v. Jones*, 115 S. Ct. 2151 (1995), are present. Finally, the importance of Westfall Act immunity mandates immediate review. The Westfall Act was passed by Congress to free federal employees from the burdens of facing litigation just for doing their jobs. Any abrogation of that immunity must be accompanied by the right of immediate review to effectuate the intent of the statute.

III. A DENIAL OF QUALIFIED IMMUNITY RAISED IN A MOTION TO DISMISS INVARIABLY PRESENTS AN IMMEDIATELY APPEALABLE QUESTION OF LAW

Sosa and Garate also appealed the denial of their motion to dismiss respondent's *Bivens* claims on the basis of qualified immunity. The Ninth Circuit dismissed those appeals on the basis of *Johnson v. Jones*, 115 S. Ct. 2151 (1995). (App. 2a.) After reconsidering the dismissal in light of *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), which made it clear that an immediate appeal from the denial of a motion to dismiss is permissible, the Ninth

Circuit still refused to reinstate the appeals. Even though Sosa and Garate had accepted respondent's allegations as true, as they were required to do for purposes of a motion to dismiss, the Ninth Circuit inexplicably held that the district court's denial of the motion could not be immediately appealed because of the supposed presence of "facts which currently are subject to a genuine dispute." (App. 1a.) In addition to correcting this obvious error, this Court should resolve any lingering doubt that exists in the Ninth Circuit and among other lower courts as to whether a denial of a motion to dismiss based on qualified immunity is *always* immediately appealable.

In *Johnson v. Jones*, this Court held that where a defendant's motion for *summary judgment* based on qualified immunity is denied on the grounds that genuine issues of material fact exist with respect to the defendant's conduct, the defendant cannot immediately appeal that decision. *See* 115 S. Ct. at 2156. In the aftermath of *Johnson*, the courts of appeals took a fresh look at their jurisdiction to hear qualified immunity appeals, with varying results.[9] Only in this case, however, has any circuit interpreted *Johnson* to bar an immediate appeal from the denial of a motion to dismiss under Rule 12(b)(6). This reasoning is flatly inconsistent with *Behrens* and with the only published opinion of the courts of appeals on the question. Nevertheless, it appears that some uncertainty still exists in the courts of appeals over whether the denial of a qualified immunity-based motion to dismiss can be appealed immediately, warranting further clarification by this Court.

When a defendant moves to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) for failing to state

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[9] *Compare Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996) (holding that *Johnson* did not affect an appellate court's authority to review "those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues") *with Finelli v. Tabb*, 67 F.3d 67, 70 (4th Cir. 1995) (relying on *Johnson* to dismiss appeal even though appellants relied only on "undisputed material facts").

a claim upon which relief can be granted, the district court accepts all the allegations of the plaintiff's complaint as true. *Zinermon v. Burch*, 494 U.S. 113, 118 (1990). In *Behrens*, this Court recognized that on a motion to dismiss on the basis of qualified immunity, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness." 116 S. Ct. at 840 (internal quotation omitted). The only issue presented by such a motion is one of law: whether the defendant is entitled to qualified immunity even where all of the allegations of the complaint are taken as true. In resolving a motion to dismiss, there *cannot* be a factual dispute that would implicate *Johnson v. Jones*. As the Fifth Circuit has recognized,

> In the Rule 12(b)(6) context, there can never be a genuine-issue-of-fact-based denial of qualified immunity, as we must assume that the plaintiff's factual allegations are true. Thus, denials of motions to dismiss on the basis of qualified immunity are always "purely legal" denials.

Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1401 (5th Cir. 1996) (footnote omitted), *reh'g en banc granted* (June 14, 1996). For this reason, the denial of a motion to dismiss on the basis of qualified immunity is final and immediately appealable.

The Ninth Circuit is not the only circuit to fail to appreciate that a motion to dismiss always presents a purely legal issue appropriate for immediate appeal. In recent decisions, the Second Circuit has held that "[w]here the applicability of the immunity cannot be decided from the face of the pleadings but requires some discovery, the denial of a motion to dismiss on the immunity ground is not appealable prior to discovery." *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990); *see also Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir. 1995); *Hill v. City of New York*, 45 F.3d 653, 659-60 (2d Cir. 1995). Similarly, the Third

Circuit believes that "an order denying a motion to dismiss based on the ground of absolute or qualified immunity is not immediately appealable when the denial is predicated on the existence of unresolved issues of fact." *Schrob v. Catterson*, 967 F.2d 929, 939 (3d Cir. 1992).

The cryptic orders of the Ninth Circuit at issue in this case appear to embrace this same approach, positing that, because the district court believed some discovery might facilitate its resolution of the qualified immunity issue, and where following that discovery the district court might eventually rule in favor of the qualified immunity defense, the denial of the motion to dismiss is unappealable because the *Cohen* final order requirement has not been met. The primary flaw in this analysis is that such a construction of the *Cohen* final order requirement would logically prevent *all* appeals at the motion-to-dismiss stage because, at least theoretically, a district court could always revisit the qualified immunity issue at the time of summary judgment, or at a subsequent stage of the litigation, and eventually rule in favor of the defendant.[10]

The reasons given by a district court in denying a motion to dismiss do not control the question of whether appellate jurisdiction is proper. Where the district court rejects a defense of qualified immunity, even when the denial is without prejudice pending completion of discovery going to that issue, the ruling always presents solely a question of law—the defendant's entitlement *vel non* to immunity from suit on the basis of allegations

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[10] In *Behrens*, this Court rejected a similar interpretation of the final order requirement adopted by the First Circuit, in the qualified immunity context, in *Kaiter v. Town of Boxford*, 836 F.2d 704, 707 (1st Cir. 1988) ("Since the district court has not yet determined whether [the defendant] has qualified immunity, and that he will *have* to stand trial, its decision is not an appealable collateral order."). *See* 116 S. Ct. at 839. The rationale underlying the Ninth Circuit orders in this case is as illogical as the First Circuit's approach adopted in *Kaiter*, and ought to be rejected for the very same reasons articulated by this Court in *Behrens*.

deemed to be true. *See Doe*, 81 F.3d at 1401 ("[D]enials of motions to dismiss on the basis of qualified immunity are always 'purely legal' denials."). The impact on the defendant is the same whether the district court explains its denial by stating simply that the complaint sufficiently alleges a violation of clearly established law, or instead, as here, by stating that more facts must be gleaned through discovery to illuminate the qualified immunity issue. In both instances, the defendant must endure the burdens of discovery and entanglement in various pretrial proceedings. Clearly then, how the district court couches its denial is immaterial to a defendant's entitlement to an immediate appeal to vindicate his right to qualified immunity. Those courts of appeals that focus on a lower court's reasons for declining to dismiss a complaint, rather than recognizing that rejection of the qualified immunity defense for any reason is always appealable immediately, are in error.

Qualified immunity has long been recognized as an immunity from suit, not merely a defense to liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The protections of qualified immunity become illusory if an individual defendant is forced to engage in discovery regarding his status before an appeal may be taken, even though the complaint alleges that the individual defendant was acting on behalf of the government and that the United States is responsible for his each and every act, and fails to allege a violation of clearly established law by that defendant. Because the precise question presented in *Behrens* was whether a government employee may take two separate appeals related to qualified immunity, perhaps the subsidiary issue was lost on some of the courts of appeals: that the denial of a motion to dismiss under Rule 12(b)(6) based on qualified immunity is *always* immediately appealable under *Mitchell v. Forsyth*. This case, in light of the important Westfall Act question also presented, provides the appropriate vehicle for this Court to dispel any remaining uncertainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed May 23, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-55467
95-55469

DC# CV-93-4072-JGD
Central California

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff/Appellee,

vs.

UNITED STATES OF AMERICA, *et al.*,
Defendants,

and

ANTONIO GARATE-BUSTAMANTE,
Defendant-Appellant.

Before: SNEED, POOLE and HAWKINS, Circuit Judges

ORDER

Appellants' motion for reconsideration and reinstatement of their dismissed appeals is denied because the district court is not compelled initially to determine any *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) damages claim whether defendants are entitled to qualified immunity on basis of their version of facts which currently are subject to a genuine dispute. *See Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996).

APPENDIX B

[Filed Dec. 19, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-55467
Nos. 95-55469

DC# CV-93-4072-JGD
Central California

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA, *et al.*,
Defendants,

and

ANTONIO GARATE-BUSTAMANTE,
Defendant-Appellant.

Before: SNEED, POOLE and HAWKINS, Circuit Judges

ORDER

Appellee's motion to dismiss these consolidated appeals for lack of jurisdiction is granted. *See Johnson v. Jones*, 115 S. Ct. 2151, 2157 (1995); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

All pending motions are denied as moot.

APPENDIX C

[Filed Jan. 20, 1995 Entered Jan. 23, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-4072 JGD (JHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, HECTOR BERELLEZ, BILL WATERS, PETE GRUDEN, JACK LAWN, ANTONIO GARATE-BUSTAMANTE, FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants.

MEMORANDUM OPINION REGARDING THE DEFENDANTS' MOTIONS TO DISMISS AND TO SUBSTITUTE

On August 9, 1994, the following motions came on before the Court for hearing: (1) Motion to Dismiss on Behalf of the Individual Federal Defendants; (2) United States' Motion to Substitute Itself on All Claims Against Defendants Garate-Bustamante and Sosa Except the Constitutional Claims; (3) Motion to Dismiss All Claims Against Defendant Sosa; (4) Motion to Dismiss All Claims Against Defendant Garate-Bustamante; and (5) Motion to Dismiss on Behalf of the United States. After considering the written submissions of the parties and the oral arguments of counsel, the Court rules as follows.

FACTUAL BACKGROUND

In this action, plaintiff Humberto Alvarez-Machain ("Alvarez") seeks damages for injuries sustained during his abduction from Mexico by agents of the United States Drug Enforcement Agency ("DEA") and his subsequent detention pending trial in this country. The facts, as alleged in the First Amended Complaint and in published opinions pertaining to the underlying criminal action,[1] are as follows.

On February 7, 1985, DEA Special Agent Enrique Camarena was kidnapped outside the consulate of the United States in Guadalajara, Mexico. His mutilated body was found near Guadalajara one month later, along with that of Alfredo Zavala-Avelar, a Mexican pilot who had assisted Camarena in locating marijuana plantations.

The DEA attributed the killings of Camarena and Zavala to a drug trafficking cartel based in Guadalajara. An investigation resulted in the indictment of various suspects, two of whom were brought to this country to stand trial by means of covert forcible abduction from their homelands. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990); *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), *cert. denied*, 498 U.S. 990 (1990).

Alvarez, a doctor of medicine with a specialty in obstetrics and gynecology who practiced in Guadalajara, was one of the DEA's suspects. In March 1988, Judge Edward Rafeedie of this district issued a warrant for the arrest of Alvarez as a material witness. In an indictment returned in January 1990, he was charged with conspiracy

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[1] The Court takes judicial notice of: *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992), *on remand*, 971 F.2d 310 (9th Cir. 1992).

to kidnap a federal agent, felony-murder and other offenses.[2]

Between December 1989 and January 1990, the DEA unsuccessfully attempted to secure Alvarez's presence in the United States through informal negotiations with representatives of the Mexican government. When these negotiations failed, DEA Special Agent Hector Berellez, the chief of the Camarena investigation, told informant Antonio Garate-Bustamante ("Garate"), a Mexican citizen, that the DEA would pay Garate and his associates a $50,000 reward plus expenses for delivering Alvarez to the DEA in the United States. Berellez was authorized to make this offer by senior DEA officials in Los Angeles and Washington, including Deputy Director Pete Gruden.

During March 1990, Berellez had several discussions with Garate regarding the preparations of Garate's associates in Mexico. According to Berellez, the final terms of the abduction were approved by the DEA in Washington.

On the evening of April 2, 1990, Alvarez was abducted at gunpoint from his medical office in Guadalajara. During his captivity in Mexico, Alvarez claims that he was punched in the stomach, subjected to electric shocks through the soles of his shoes and twice injected with an unknown substance that made him light-headed, nauseous and dizzy. One of the abductors, a "fair-skinned man," said he was "with the DEA."

Alvarez was transported by private plane to El Paso, Texas, where he arrived on April 3. Berellez, Garate and others met Alvarez on the runway and took him into custody. The abductors remained on the plane, though one declared: "We are Mexican police. Here is your fugitive." Alvarez was taken to another location and interrogated. He recalls that he was deprived of food and

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[2] *See* Sixth Superseding Indictment, Ex. 5 to Antonio Garate-Bustamante's Request for Judicial Notice.

subjected to verbal threats, the nature of which he does not specify.

An April 4, Alvarez complained of chest pains and received medical treatment in the El Paso area.[3] During the initial period of his incarceration, the government purposefully identified him with a pseudonym, which hindered the ability of his family, attorney and Mexican authorities to contact him. On April 10, Alvarez was transported to Los Angeles for arraignment before Judge Rafeedie.

In several diplomatic notes transmitted to the United States Department of State, the Mexican government protested Alvarez's abduction and demanded his repatriation to Mexico.

Alvarez filed a motion to dismiss the indictment for outrageous government conduct and for lack of personal jurisdiction. On August 10, 1990, after a one-day evidentiary hearing, Judge Rafeedie held that he lacked jurisdiction over Alvarez because the United States had directed his abduction from Mexico in violation of its obligations under an extradition treaty between the two countries. 745 F. Supp. 599. The Ninth Circuit affirmed. 946 F.2d 1466. However, the Supreme Court reversed on June 15, 1992, holding that the abduction did not violate the extradition treaty. 112 S. Ct. 2188. On remand, the Ninth Circuit denied Alvarez's additional arguments for dismissal. 971 F.2d 310. Alvarez remained in custody at the Metropolitan Detention Center in Los Angeles during the pendency of these appeals.[4]

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[3] Although Alvarez alleges in his First Amended Complaint that he received inadequate medical care while detained in the United States, he has abandoned this claim. Opposition to Motion to Dismiss of the United States at 1 n.1.

[4] Judge Rafeedie initially ordered that Alvarez be detained without bail. After a third bail hearing on December 16, 1991, the Judge set bail at $10 million, a sum Alvarez did not post.

On December 14, 1992, Judge Rafeedie granted Alvarez's motion for acquittal on all charges on the ground that the government had adduced insufficient evidence to support a guilty verdict. Alvarez was released from custody more than 32 months after his abduction.

On July 9, 1993, Alvarez initiated this tort action. In the First Amended Complaint, filed January 31, 1994, Alvarez seeks damages based on the following claims: (1) kidnapping; (2) torture; (3) cruel and inhuman and degrading treatment or punishment; (4) prolonged arbitrary detention;[5] (5) violations of the Fourth, Fifth and Eighth Amendments; (6) assault and battery; (7) false imprisonment; (8) intentional infliction of emotional distress; (9) false arrest; (10) negligent employment of public employees and agents; and (11) negligent infliction of emotional distress. The legal bases for these theories of recovery are stated in the most general of terms. In addition to the Fourth, Fifth and Eighth Amendments, Alvarez invokes the Alien Tort Claims Act ("ATCA"),[6] the Torture Victim Protection Act of 1991 ("TVPA"),[7] international law, Mexican law and California law.

The defendants are the United States, DEA Special Agent Berellez, DEA Special Agent and Senior Inspector Bill Waters, former DEA Deputy Director Pete Gruden, former DEA Director Jack Lawn, DEA informant Garate, DEA informant Francisco Sosa, and five unnamed Mexican nationals who allegedly participated in the abduction and are now in the federal witness protection program. All of the individual defendants are named in their individual capacities.

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[5] The second, third and fourth causes of action are misnumbered on the cover sheet of the First Amended Complaint.

[6] The ATCA, codified at 28 U.S.C. § 1350, is also known as the Alien Tort Statute.

[7] Pub. L. No. 102-256, 106 Stat. 78 (codified at 28 U.S.C. § 1350 Note).

No defendant has answered. The parties stipulated to several continuances to allow the instant motions to be heard concurrently.

DISCUSSION

The Court will address the motions *seriatim* in the same order as they were heard during oral argument. Garate and Sosa have filed notices of joinder in all motions except the Motion to Dismiss on Behalf of the United States.

I. Motion to Dismiss on Behalf of the Individual Federal Defendants

Defendants Berellez, Waters, Gruden and Lawn offer three arguments: (a) the Court lacks personal jurisdiction over Gruden and Lawn; (b) the United States should be substituted in as the defendant on all but the federal constitutional claims; and (c) qualified immunity shields them from liability on the constitutional claims.

A. Personal Jurisdiction

Alvarez alleges that Gruden and Lawn were the Deputy Director and Director of the DEA and "participated in the decision" to kidnap him. First Amd. Complt., paras. 8-9. Gruden and Lawn contend that the Court lacks personal jurisdiction because they do not reside in California and have insufficient contacts with the state to render them subject to suit.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Unless a defendant's activities in a forum are "continuous and systematic" or "substantial," in which case the state has general jurisdiction over the defendant,

the state must establish specific jurisdiction based on the quality and nature of the defendant's contacts with the state in relation to the cause of action. *Lake v. Lake*, 817 F.2d 1416, 1420-21 (9th Cir. 1987). The *Lake* court explained:

> We use a tripartite analysis in determining specific jurisdiction: (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. at 1421.

The plaintiff bears the burden of proving that the court has personal jurisdiction. Where, as here, a defendant's motion to dismiss is made as part of its initial response to a complaint, the plaintiff need only make a *prima facie* showing that jurisdiction exists and uncontroverted allegations in the complaint are deemed true. W. Schwarzer, A. Tashima & J. Wagstaffe, *Federal Civil Procedure Before Trial* §§ 9:113-17 (1994).

Here, the essential jurisdictional facts are undisputed. Alvarez was indicted in the Central District of California in January 1990. In April 1990 he was abducted in Mexico, held in Texas for one week, then transported to the Central District where he was detained for approximately 32 months pending trial. Gruden and Lawn do not disclaim responsibility for the decision to abduct Alvarez.

Under the first prong of the minimum contacts analysis (purposeful availment), the Supreme Court "has allowed

the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state." *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986) (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)). "*Calder* thus established that personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).

Alvarez persuasively invokes this "effects test." He emphasizes that Gruden and Lawn approved his abduction from Mexico for the express purpose of bringing him to trial in the Central District of California. Under these circumstances, they could reasonably anticipate being haled into court in California. *Lake*, 817 F.2d at 1422.

Under the second prong of the minimum contacts standard, Alvarez's claim plainly arises out of the defendants' forum-related activities. Alvarez seeks damages for his abduction from Mexico, his treatment in Mexico and Texas and his lengthy detention in this district.

Once a plaintiff has established minimum contacts under the first two prongs of the test, the defendant must show that "traditional notions of fair play and substantial justice" render the assertion of jurisdiction unreasonable. *Id.* at 1421-22. Seven factors must be considered: (1) the burden on the defendant; (2) existence of an alternative forum, (3) convenient and effective relief for the plaintiff, (4) the forum state's interest in adjudicating the suit, (5) efficient resolution of the controversy, (6) purposeful interjection, and (7) conflicts with sovereignty. *Id.* The Court finds that these factors weigh in favor of jurisdiction. Resolution of this action in one forum serves judicial economy and Gruden and Lawn will not be burdened by defending from afar since they are repre-

sented by the Department of Justice. California has an interest in the litigation since Alvarez was incarcerated in this state for a lengthy period. Thus, the Court finds that it has personal jurisdiction over Gruden and Lawn.

B. Substitution Under the Liability Reform Act

Berellez, Waters, Gruden and Lawn contend that the United States should be substituted in their stead with respect to the plaintiff's non-constitutional claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Liability Reform Act"), 28 U.S.C. § 2679. The Court agrees.

The Liability Reform Act limits the relief available to persons injured by federal government employees acting within the scope of their employment. For persons so injured, the remedy against the United States under the Federal Tort Claims Act ("FTCA") "is exclusive of any other civil action or proceeding for money damages." 28 U.S.C. § 2679(b)(1). However, two categories of civil actions are excepted: those "brought for a violation of the Constitution of the United States" and those "brought for a violation of statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A) and (B).

Procedurally, the Liability Reform Act provides for substitution of the United States "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1).

The Attorney General, acting through her designated representative, has certified that Berellez, Waters, Gruden and Lawn acted in the scope of federal employment at the time of the alleged acts giving rise to Alvarez's claims. Ex. 5 to Motion to Dismiss. Alvarez does not contest this certification.

1. Claims Admittedly Subject to Substitution

Alvarez admits that his claims under the laws of California and Mexico are subject to substitution under the Liability Reform Act. The Court reads the following claims as arising solely under California or California and Mexican law: six (assault and battery), seven (false imprisonment), eight (intentional infliction of emotional distress), ten (negligent employment of public employees and agents) and eleven (negligent infliction of emotional distress). In claims one (kidnapping), two (prolonged arbitrary detention), three (cruel, inhuman and degrading treatment) and nine (false arrest), the plaintiff invokes "state, federal and international law." To the extent that these claims rest on state law, substitution is not contested.

2. Federal Statutory Claims Exception

The parties dispute whether the claims based on international law [8] are subject to substitution. Alvarez con-

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[8] According to the Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987), the sources of international law are as follows:

> (1) A rule of international law is one that has been accepted as such by the international community of states
>
> (a) in the form of customary law;
>
> (b) by international agreement; or
>
> (c) by derivation from general principles common to the major legal systems of the world.
>
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
>
> (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.
>
> (4) General principles common to major legal systems, even if not incorporated or reflected in customary law or international

tends that international law claims may be brought under the ATCA and therefore lie within the Liability Reform Act's exception for federal statutory claims, 28 U.S.C. § 2679(b)(2)(B). The issue, apparently, is a matter of first impression.

The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATCA was enacted as part of the First Judiciary Act of 1789 but seldom has been invoked. *In re Estate of Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) (*Estate I*), *cert. denied*, 113 S. Ct. 2960 (1993). Indeed, prior to 1980, the United States district courts heard only 21 lawsuits arising under the ATCA. K. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Claims Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 4-5 n.15 (1985).

The Ninth Circuit recently held that the ATCA creates a cause of action and rejected the argument that the provision is purely jurisdictional. *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) (*Estate II*). "We thus join the Second Circuit in concluding that the [ATCA] creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer[] fundamental rights upon all people vis-a-vis their own governments.'" *Id.* at 1475 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1980)). The court of appeals reasoned that § 1350, unlike the general federal question jurisdictional provision (28 U.S.C. § 1331), "does not require that the action 'arise under' the law of nations, but only mandates a

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agreements, may be invoked as supplementary rules of international law where appropriate.

See also Siderman v. Republic of Argentina, 965 F.2d 699, 714-15 (9th Cir. 1992) (discussing the sources of customary international law), *cert. denied*, 113 S. Ct. 1812 (1993).

'violation of the law of nations' in order to create a cause of action." *Id.*

A claim meets the federal statutory exception to the Liability Reform Act if the claim (1) is authorized under a federal statute and (2) is brought for a violation of that statute. 28 U.S.C. § 2679(b)(2)(B); *United States v. Smith*, 111 S. Ct. 1180, 1189 (1991). Given the Ninth Circuit's decision in *Estate II*, claims for violations of international law brought under the ATCA clearly satisfy the first condition. Whether the second condition is satisfied presents a more difficult question.

The defendants contend that the issue is controlled by *Smith*. That case involved a medical malpractice claim brought against a doctor employed by the United States Army based on injuries that occurred in Italy. The plaintiff sued under Italian law, California law, and "general American principles of law." *Id.* at 1183 and n.1. The Ninth Circuit held that the Liability Reform Act did not permit substitution of the United States because the FTCA exception for injuries sustained abroad precluded recovery against the United States. 885 F.2d 650. The court of appeals also rejected substitution under the Gonzalez Act, 10 U.S.C. § 1089, which applies in malpractice suits against military personnel, on the theory that the Act did not apply outside of the United States.

The Supreme Court reversed. It held that the Liability Reform Act applies even where there is no remedy against the government under the FTCA. *Smith*, 111 S. Ct. at 1183. Most importantly for present purposes, the Court considered and rejected the plaintiff's argument that a claim for malpractice involves a violation of the Gonzalez Act, bringing the claim under § 2679(b)(2)(B). *Id.* at 1189. The Court explained: "Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Id.* The Court noted that

while the legislative history of the Liability Reform Act fails to disclose what causes of action Congress sought to preserve in § 2679(b)(2)(B), "a malpractice suit alleging a 'violation' of the Gonzalez Act cannot have been one of them." *Id.*

Alvarez plausibly attempts to distinguish *Smith*. He emphasizes that the purpose of the Gonzalez Act was to limit malpractice liability. *See Smith*, 111 S. Ct. at 1188 ("The Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs.") In contrast, the ATCA authorizes a cause of action in federal courts for violations of the law of nations; it is creative, not restrictive.

This distinction is not persuasive. It is international law, not the ATCA, that "confers fundamental rights upon all people vis-a-vis their own governments." *Filartiga*, 630 F.2d at 885. These rights exist independent of the availability of legal venues in a given nation. *Estate II*, 25 F.3d at 1475; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-78 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). Hence, the ATCA is properly viewed "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga*, 630 F.2d at 887. By comparison and as discussed below, the recently-enacted TVPA, 28 U.S.C. § 1350 Note, creates a tort action for two specifically-defined wrongs: torture and extrajudicial killing. The duties created by the TVPA are distinct from those imposed by international law.

To the extent that the ATCA's creation of a federal venue is significant, it is noteworthy that the ATCA was not a necessary key to our country's courts at the time of its enactment. The law of nations "became a part of the law *of the United States* upon the adoption of the Constitution." *Filartiga*, 630 F.2d at 886. As Alvarez

himself explains, "Congress adopted the ATCA with the knowledge that [international torts] could already be brought under the laws of the several states, because of the absorption of the law of nations . . . into state common law. Congress wished to provide the option of federal court jurisdiction for alien plaintiffs who might fear bias in state courts." Opposition to Motion to Dismiss on Behalf of the United States at 8; *see Tel-Oren*, 726 F.2d at 782-83 (Edwards, J., concurring).

Finally, finding that claims under the ATCA do not fall within § 2679(b)(2)(B) is consistent with the general purpose of the Liability Reform Act. As emphasized in *Smith*, 111 S. Ct. at 1185 n.9 and 1189 n.16, the House committee report stated that the exclusive remedy provision of the Liability Reform Act "is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment." H.R. Rep. No. 700, 100th Cong. at 6, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5950. The Court doubts that Congress intended § 2679 (b)(2)(B) to permit a broad exception for violations of international law.

Thus, the Court finds that the logic of *Smith* is persuasive in this case. An infraction of the law of nations is not a "violation" of the ATCA and the federal statutory claims exception to the Liability Reform Act does not benefit Alvarez.

3. Constitutional Claims Exception

Alvarez further argues that his claims under international law fall within the constitutional claims exception to the Liability Reform Act, 28 U.S.C. § 2679(b)(2)(A), on the ground that the international law is constitutionally incorporated into United States law. This contention plainly lacks merit. As noted earlier, international law is an integral part of the *common law*. *Estate I*, 978 F.2d at 502; *Filartiga*, 630 F.2d at 886. The Constitution's

only reference to the law of nations is contained in Article I, sec. 8, cl. 10, which grants to Congress the power to "define and punish . . . Offenses against the Law of Nations."

To summarize, the Court holds that the claims under international law are subject to substitution under the Liability Reform Act. Since Alvarez admits that the California and Mexican law claims are subject to substitution, the only remaining claims against the four moving defendants are those based on the Constitution.

C. Qualified Immunity

In his fifth claim for relief, based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Alvarez alleges that the defendants deprived him of unspecified rights under the Fourth, Fifth and Eighth Amendments. He very generally complains of defendants' "acts of kidnapping, torture, cruel, inhuman and degrading treatment or punishment, denial of adequate medical treatment and prolonged arbitrary detention." First Amd. Complt., para. 39.

The Eighth Amendment claim is plainly untenable since it applies only after a defendant has been convicted, *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977), and Alvarez was acquitted. Thus, the Court need only evaluate the claims under the Fourth and Fifth Amendments.

The moving defendants invoke the protection of qualified immunity. Under this doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A two-part analysis is required. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

First, the plaintiff must prove that the law governing the official's conduct was clearly established at the time of the alleged wrongdoing. *Houghton v. South*, 965 F.2d 1532, 1534 (9th Cir. 1992); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Second, the official must prove that under the law a reasonable official could have believed the conduct was lawful. *Houghton*, 965 F.2d at 1534; *Benigni v. City of Hemet*, 879 F.2d 473, 479 (9th Cir. 1988).

The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court. *Act Up!*, 988 F.2d at 873. The determination of whether the facts alleged could support a reasonable belief that the officer's conduct was legal "is also a question of law to be determined by the courts." *Id.* (citing *Hunter v. Bryant*, 112 S. Ct. 534 (1991)). The question is whether the officer "acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of events" is possible. *Hunter*, 112 S. Ct. at 537.

1. Events While Alvarez Was in Mexico

The qualified immunity analysis in this action requires a temporal bifurcation: the events occurring prior to Alvarez's arrival in the United States on April 3, 1990 must be considered separately from the events occurring afterwards. The Court finds that, at the time of Alvarez's abduction, it was not clearly established whether non-resident aliens situated outside of the United States enjoyed the protection of the Fourth and Fifth Amendments.

As an initial matter, the Court is unpersuaded by the defendants' reliance on the *Ker-Frisbie* doctrine. In *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), the Supreme Court held that the forcible abduction of a criminal defendant does not divest a court of jurisdiction to try the defendant. "There is nothing in the Constitution that requires a court to permit

a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* at 522. The Supreme Court discussed and applied *Ker-Frisbie* in the underlying criminal appeal. *United States v. Alvarez-Machain*, 112 S. Ct. at 2192-93.

The *Ker-Frisbie* doctrine is properly limited to the jurisdiction of a court to hear criminal charges against an abducted defendant. Several courts of appeals have recognized that a defendant who cannot obtain dismissal because of *Ker-Frisbie* may commence a civil action for the constitutional torts committed by his or her abductors. *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir. 1992); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 n.7, 262 (7th Cir.), *cert. denied*, 498 U.S. 878 (1990); *Brown v. Nutsch*, 619 F.2d 758, 764 (8th Cir. 1980); *Waits v. McGowan*, 516 F.2d 203, 208 (3d Cir. 1975); *see also Brown v. Doe*, 2 F.3d 1236, 1243 (2d Cir. 1993) (action under 42 U.S.C. § 1983, not dismissal, is proper remedy for mistreated pre-trial detainee), *cert. denied*, 114 S. Ct. 1088 (1994). The defendants offer no authority for the proposition that *Ker-Frisbie* may be used as a shield by abductors in civil actions for damages.

Independent of *Ker-Frisbie* is the question of whether the protections of the Constitution extend to nonresident aliens situated abroad. Approximately five weeks prior to the abduction of Alvarez, the Supreme Court rendered its decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Like Alvarez, Verdugo was a citizen and resident of Mexico and a suspect in the murder of Camarena. Verdugo was transported to the border by Mexican police officers and arrested by United States officials. Shortly thereafter, United States and Mexican authorities jointly searched Verdugo's residences in Mexico. Verdugo moved to suppress the seized evidence.

The Supreme Court held that Verdugo lacked sufficient contacts with this country to enjoy Fourth Amendment protection. Per Justice Rehnquist, the Court stated that

"the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own government; it was never intended to restrain the actions of the Federal Government against aliens outside of United States territory." *Id.* at 266. Citizens of the United States located abroad are protected by the Constitution, as are aliens who are present in and have significant connection to this country. *Id.* at 270-71. The Court determined that Verdugo's short-term presence in this country at the time of the searches was "fortuitous" and did not vest him with Fourth Amendment rights. *Id.* at 271-72.

Alvarez attempts to undercut the significance of *Verdugo-Urquidez* in two ways. First, he erroneously claims that the decision was rendered after his abduction. Second, he argues that Justice Rehnquist wrote for a plurality. In fact, the opinion was endorsed by five justices; in a concurrence, Justice Kennedy noted his "fundamental" agreement with the Court, but pointed out several disagreements with Justice Rehnquist's reasoning. *Id.* at 275. Justice Kennedy fully endorsed the principle that "the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a non-resident alien." *Id.* at 278.

In light of *Verdugo-Urquidez*, it was not clearly established that the Fourth Amendment applied to Alvarez when he was seized in Mexico. At best, Alvarez can say that there is some ambiguity about the scope of Fourth Amendment rights after the Supreme Court's decision, which does not defeat the immunity claim.

While all claims of excessive force in the course of an arrest are analyzed under the Fourth Amendment, *Graham v. Connor*, 490 U.S. 386, 395 (1989), *United States v. Reese*, 2 F.3d 870, 883 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994), Alvarez also claims that his Fifth Amendment rights were violated. When an arrest ends, substantive due process protects the pre-trial detainee

from the use of excessive force that amounts to punishment. *Graham*, 490 U.S. at 395 n.10 (1989). "The right of the custodial subject to be protected from harm is firmly rooted in substantive due process jurisprudence." *United States v. Koon*, 94 Daily Journal D.A.R. 11624, 11639-40 (9th Cir. August 19, 1994). A person is in custody when "in light of all the circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave." *Id.* at 11640. Thus, the Court will assume that substantive due process rights potentially attached while Alvarez was in Mexico.

"Although *Verdugo* is a Fourth Amendment case, it nonetheless provides a helpful analytical framework for determining whether other constitutional provisions apply to governmental activities having extraterritorial dimensions." *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991) (considering the Establishment Clause). Comparing the terms of the Fourth and Fifth Amendments, the Supreme Court noted that the latter applies to "persons" while the former applies to "the people" which he construed as meaning "the people of the United States." *Verdugo-Urquidez*, 494 U.S. at 265-66. This distinction suggests that the Fifth Amendment applies more broadly than the Fourth. However, the balance of the opinion suggests that the Fifth Amendment should be construed as lacking extraterritorial application with respect to nonresident aliens. After discussing the so-called *Insular Cases*, which hold that only fundamental constitutional rights are guaranteed to residents of territories controlled by the United States, the Court observed:

> Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 . . . (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not ob-

tain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. . . . [O]ur rejection of extraterritorial application of the Fifth Amendment was emphatic:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of the Court supports such a view. None of the learned commentators on our Constitution even hinted at it. The practice of every modern government is opposed to it. *Id.* at 784.

Verdugo-Urquidez, 494 U.S. at 269. This language strongly suggests that the Fifth Amendment does not apply outside our borders.

Additionally, the Court expressed a policy rationale for limiting the application of the Fourth Amendment that is equally applicable to substantive due process rights: the deleterious effect of judicial restraint of law enforcement and military operations abroad. *Id.* at 273-74. If Verdugo had prevailed in his suppression motion,

> aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters. Perhaps a *Bivens* action might be unavailable in some or all of these situations due to "special factors counselling hesitation," but the Government would still be faced with case-by-case adjudications concerning the availability of such an action. And even were *Bivens* deemed wholly inapplicable in cases of foreign activity, that would not obviate the problems attending the appli-

> cation of the Fourth Amendment abroad to aliens. The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands.

Id. at 274 (citations omitted). It would be anomalous if law enforcement officers were not subject to constitutional limitation in searching and seizing a person abroad (under the Fourth Amendment) but were subject to limitation in holding that seized person (under substantive due process).

A Ninth Circuit panel, albeit in passing, has read *Verdugo-Urquidez* for the broad proposition that "the Constitution itself does not apply to aliens whose claims arise outside the United States." *Estate II*, 25 F.3d at 1476 n.12. The *Estate II* court was considering whether tort claims against the Marcos estate abated on the death of the plaintiff or the defendant and analogized to claims under the Eighth Amendment and 42 U.S.C. § 1983. *Id.* at 1476. The Court does not regard footnote 12 as a definitive statement of the scope of *Verdugo-Urquidez* though the footnote provides some support for an expansive reading of the Supreme Court's opinion.

Alvarez cites several lower court cases decided before and after *Verdugo-Urquidez* in support of his position that the Fifth Amendment applies to nonresident aliens outside the United States. In only one of cases he cites, *Xiao v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993), did a court actually suggest that the Amendment has such extraterritorial scope. *Id.* at 1547-48.[9] In *Xiao*, the court concluded that an alien could claim substantive due process violations based on acts taken by United States officials while he was detained in the People's Republic of China. The court distinguished *Verdugo-Urquidez* on the ground that the plaintiff complained of an American

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[9] The other cases cited by Alvarez all involve due process claims by aliens held in territory controlled by the United States, not territory of a foreign sovereign.

prosecutorial effort that spanned two years while the constitutional deprivations claimed by Verdugo occurred on a single day. The court also stressed that many of the improper actions were taken by United States officials inside the country. *Id.* at 1548.

To the extent that *Xiao* affords due process rights to nonresident aliens abroad and is correct in so doing, it is distinguishable. Alvarez complains of a single incident, his abduction, that occurred over a short time period. He does not argue that his physical mistreatment in Mexico can be considered a due process violation that arose in the United States. *See Verdugo-Urquidez,* 494 U.S. at 264 (violation of Fourth Amendment occurs solely in country of search). These distinctions aside, the significance of *Xiao* is limited because the court did not decide whether the due process right at issue was clearly established; since the defendants in that case were sued in their official capacities, they could not claim immunity. Further, *Xiao* was decided in March 1993, three years after Alvarez was abducted, and thus could not have provided guidance to the defendants at the time of their actions as to the scope of the Due Process Clause.

In sum, the Court finds that the qualified immunity analysis with respect to events preceding Alvarez's arrival in the United States is controlled by *Verdugo-Urquidez.* Alvarez lacked clearly established rights and, therefore, the defendants are entitled to immunity.

2. Events After Alvarez Arrived in the United States

Once Alvarez arrived in the United States, he was protected by the Constitution from mistreatment at the hands of his captors. Pretrial detainees possess clearly established due process rights, including a right to be free from punishment, *Bell v. Wolfish,* 441 U.S. 520, 534-37 (1979), *Redman v. County of San Diego,* 942 F.2d 1435, 1440 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 972

(1992), that are at least as great as those afforded to convicted persons by the Eighth Amendment. However, Eighth Amendment standards provide a baseline of care. *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). Under the Eighth Amendment, an inmate must be provided with basic human needs: food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). An official must act with at least deliberate or reckless indifference to violate a pretrial detainee's rights. *Redman*, 942 F.2d at 1443.

Apparently, Alvarez's most serious claims of mistreatment (i.e. beating, electrical shocks, threats and injections) pertain to the events prior to his arrival in El Paso. The constitutional claims after his arrival are stated generally. Three potential constitutional violations emerge from paragraphs 17 and 19 of the First Amended Complaint: (1) the DEA agents including Berellez "threatened" Alvarez while interrogating him on April 3-4; (2) the agents denied him food during this time; and (3) the DEA initially incarcerated him under a false name, making it impossible for Alvarez to be reached by his family, attorney or the Mexican government.[10]

Except as these claims identify Berellez, the involvement of the four moving defendants is unclear, rendering it difficult to determine whether they personally partici-

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[10] Two other potential constitutional violations are discernable from the First Amended Complaint.

In paragraph 51 (part of the claim for intentional infliction of emotional distress), Alvarez alleges that Berellez, Garate and others "threatened [him], locked him in a small windowless room when he refused to cooperate, and forced him to stand naked and be photographed." It is unclear whether Alvarez claims that this incident amounted to a constitutional tort.

Additionally, as stated in footnote 3 above, Alvarez claims that he was deprived of adequate medical care while in custody in the United States, but abandons this contention in his opposition papers.

pated in or directed the conduct at issue, or knew of the conduct and failed to prevent it. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989) (supervisors not vicariously liable for constitutional torts of subordinates). On the other hand, the pleading requirements of Fed.R. Civ.P. 8 are minimal.[11]

The Court determines that the allegations of constitutional wrongs in the United States are sufficient to defeat the claim to qualified immunity. Alvarez may be able to prove that the defendants violated his clearly established constitutional rights and will be given the opportunity to obtain such proof.

II. Motion to Substitute the United States for Defendants Garate and Sosa

Pursuant to the Liability Reform Act, discussed in section I.B above, the United States moves to substitute itself for Garate and Sosa on all but the constitutional claims. Garate and Sosa join in the motion.

The Attorney General has certified that Garate and Sosa were federal employees acting in the course and scope of their employment at the time of the underlying events. Attachment to Motion to Substitute. However, unlike in the previous motion, Alvarez contests this certification. He contends that Garate and Sosa were not employees and, even if they were, they were not acting in the scope of their employment when they mistreated him.

The Attorney General's certification is subject to *de novo* review by the district court, *Meridian Int'l Logis-*

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[11] A heightened pleading standard applies to *Bivens* cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort. *Branch v. Tunnell,* 14 F.3d 449, 452 (9th Cir.), *cert. denied,* 114 S. Ct. 2704 (1994). The defendants do not argue that the heightened standard should apply in this case.

tics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991), both as to employment and as to action within scope of employment. *Wang v. Horio*, 741 F. Supp. 1373, 1376-77 (N.D. Cal. 1989), *aff'd in part and rev'd in part sub nom. Wang v. United States*, 947 F.2d 1400 (9th Cir. 1991) (see especially footnote 3). The plaintiff bears the burden of presenting evidence and disproving the certification. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993).

Federal law governs the question of whether an individual is a federal employee. *Ward v. Gordon*, 999 F.2d 1399, 1403 (9th Cir. 1993). An "employee of the government" encompasses a person "acting on behalf of a federal agency in an official capacity, temporarily or permanently, in the service of the United States, with or without compensation." 28 U.S.C. § 2671. Despite this broad definition, in accord with common law principles independent contractors are not regarded as federal employees. *United States v. Orleans*, 425 U.S. 807, 813-14 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973). As stated by the Ninth Circuit, the "critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the 'detailed physical performance' and 'day to day operations' of the contractor, and not whether the agency must comply with federal standards and regulations." *Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993) (quoting *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983)).

The United States, Garate and Sosa rely on Judge Rafeedie's factual findings and the allegations in Alvarez's First Amended Complaint and administrative tort claim. In essence, the movants take the position that Judge Rafeedie's findings conclusively establish an employer-employee relationship and that Alvarez's allegations amount to a judicial admission of employee status. "Factual assertions in pleadings and pretrial orders, un-

less amended, are considered judicial admissions conclusively binding on the party who made them." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

Although Judge Rafeedie's findings of fact do not have issue-preclusive effect, a point discussed in section III.A below, the Court may consider the facts therein for purposes of this motion. The findings are ambiguous with respect to the status of Garate and Sosa. Judge Rafeedie determined that the abductors acted as "paid agents" of the United States. 745 F. Supp. at 605. Berellez testified that the "final terms" of the abduction were approved by the DEA and Garate testified that he "could not take any step" without seeking the approval of Berellez. *Id.* at 603 and n.7. On the other hand, the operation was conducted in Mexico and Berellez "testified that no DEA agents participated in the actual kidnapping." *Id.* at 603. Berellez did not know whether the abductors were acting under the authority of the Mexican government. *Id.* at 603 n.8. Sosa is not even mentioned in Judge Rafeedie's opinion.

Apparently, Judge Rafeedie used the term "paid agent" in accord with the analytical framework enunciated by the Ninth Circuit in *United States v. Lovato*, 520 F.2d 1270 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985 (1975). The *Lovato* court suggested that, notwithstanding the *Ker-Frisbie* doctrine, a district court may lack jurisdiction over an abducted defendant who is subjected to "grossly cruel and unusual barbarities" by "persons who can be characterized as paid agents of the United States." *Id.* at 1271.[12] A "paid agent" under *Lovato* is not necessarily an "employee" under 28 U.S.C. § 2671.

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[12] *Lovato* followed the lead of the Second Circuit in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975), and *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). The theory recognized by these cases is often referred to as the "*Toscanino-Lovato* exception" to the *Ker-Frisbie* doctrine.

In the First Amended Complaint, Alvarez alleges that: he was kidnapped "by U.S. agents" and his kidnapping and mistreatment were "orchestrated by the United States and its agents," para. 1; the United States is responsible "for the acts of each and every" other defendant, "all of whom were acting as its agents or employees," para. 5; Berellez "was directly involved in or supervised the U.S. government operation," para. 6; Garate, a "paid agent," planned and implemented the decision to kidnap, para. 10; and Sosa, also a "paid agent," was "directly responsible" for the kidnapping, para. 11. Alvarez's use of the term "agent" appears to be an adoption of Judge Rafeedie's terminology, not an admission of employment status.

The language in the administrative claim is similar to that in the First Amended Complaint. *See* Claim for Damage, Injury or Death, attachment to Sosa's Request for Judicial Notice, filed July 25, 1994. Even if the claim is more suggestive of employment status, the allegations therein are not properly regarded as judicial admissions. The First Amended Complaint can be regarded as an amendment to the administrative claim.

Neither Judge Rafeedie nor Alvarez unmistakably identify Garate and Sosa as "employees" as that term is defined in 28 U.S.C. § 2671. An "agent" can be an employee or an independent contractor. *See* Restatement (Second) of Agency §§ 2, 14N (1958); Black's Law Dictionary 62 (6th ed. 1990) (offering as one definition of "agency" a "[r]elation in which one person acts for or represents another by latter's authority, either in the relationship of principal and agent, master and servant, or employer or proprietor and independent contractor"); *Ducey*, 713 F.2d at 516 (agreeing with government's argument that "agent" of United States was an independent contractor). Thus, the use of the label "agent" or "paid agent" is not dispositive; rather, the Court must evaluate the actual relationship between the federal government and Garate and Sosa.

Of course, the theory that Garate and Sosa were independent contractors conflicts with the allegation that the United States is liable for the acts of each and every defendant. First Amd. Complt., para. 5. Under the FTCA, the United States is responsible for the torts of its employees. 28 U.S.C. § 1346(b). However, pursuant to Rule 8(e)(2) of the Federal Rules of Civil Procedure, plaintiffs may plead inconsistent claims as long as such claims comply with the requirements of Rule 11.

Plaintiffs with colorable claims that defendants were not federal employees must be allowed a reasonable opportunity for discovery. *See Hafer v. Melo,* 13 F.3d 736, 747 (3d Cir. 1994); *S.J. & W. Ranch, Inc. v. Lehtinen,* 913 F.2d 1538, 1544 (11th Cir. 1990), *modified,* 924 F.2d 1555, *cert. denied,* 112 S. Ct. 62 (1991). If requested by the parties, an evidentiary hearing may be necessary to resolve disputed questions of jurisdictional fact. *See Pelletier v. Federal Home Loan Bank of San Francisco,* 968 F.2d 865, 874 (9th Cir. 1992). For now, since Alvarez may be able to prove that Garate and/or Sosa were independent contractors, the motion to substitute must be denied. It is unnecessary to reach the scope of employment question.

III. Motions to Dismiss Filed by Garate and Sosa

Since the motions to dismiss of Garate and Sosa are very similar, the Court will address them concurrently.

A. Collateral Estoppel

Garate and Sosa argue that Alvarez is collaterally estopped from claiming that he was tortured and mistreated by his abductors in Mexico. Garate also suggests that estoppel should apply to the alleged abusive interrogation of Alvarez in El Paso. The Court rejects these contentions.

"Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation

between the same parties." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). A three-part test applies:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the prior litigation.

Id.

"The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Id.* at 1321. The party must "introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *Id.*

Traditionally, the party invoking estoppel must have been a party to the previous litigation. However, under modern law, persons who were not parties in a case have standing to assert the defense of collateral estoppel in a subsequent proceeding. *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 (9th Cir. 1978).

Alvarez argued before Judge Rafeedie that his indictment should be dismissed on due process grounds under the *Toscanino-Lovato* exception to *Ker-Frisbie*. *See supra*, note 12. Judge Rafeedie held that, taking Alvarez's allegations as true, they did not "constitute acts of such barbarism as to warrant dismissal of the indictment under the case law." 745 F. Supp. at 605. The Judge went on to find that Alvarez's claims were "not worthy of belief." *Id.* *Toscanino-Lovato* aside, Judge Rafeedie held that Alvarez's abduction violated the extradition treaty between the United States and Mexico.

The Ninth Circuit affirmed Judge Rafeedie's ruling that the abduction violated the treaty and did not address the due process claim. The Supreme Court reversed, also

not addressing the due process claim. On remand, the Ninth Circuit addressed the due process claim for the first time. *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992). The court stated: "Alvarez-Machain's main alternative argument is that the circumstances of his abduction were so shocking that the abduction constituted a denial of due process. This contention similarly is not supported by the district court's findings." *Id.* at 311.

Judge Rafeedie's opinion does not discuss Alvarez's allegations of abuse based on events after his arrival in the United States. Hence, collateral estoppel is potentially applicable to the happenings in Mexico only, i.e., to the abduction.

Under the first element of the collateral estoppel standard, the issues at stake in this litigation are not identical to those before Judge Rafeedie. The issue there was whether the alleged governmental misconduct was so offensive to due process as to deprive the district court of jurisdiction, not whether the abductors had committed acts that could support a tort claim by Alvarez for damages. Judge Rafeedie clearly recognized that the legal standard at issue was particularly high: he stated that had Alvarez's abductors flogged him, the wrong would not have been sufficiently barbaric to justify dismissal. 745 F. Supp. at 605 n.10. Clearly, the flogging of a pretrial detainee would offend due process and could form the basis of a *Bivens* claim.

Additionally, under the third element of the collateral estoppel standard, Judge Rafeedie's rejection of Alvarez's claims of mistreatment was not a critical and necessary part of the judgment. Judge Rafeedie first ruled that Alvarez's allegations were insufficient as a matter of law even if they were taken as true. *Id.* at 745. Hence the Judge's subsequent rejection of the truth of the allegations amounts to mere *dicta*. The Ninth Circuit may have affirmed Judge Rafeedie on the basis of the insufficiency

of the alleged mistreatment, not because it agreed that Alvarez's allegations were not worthy of belief. If an appellate court affirms on one ground used by the trial court without passing on a second ground used by the trial court, the second ground does not have preclusive effect. *Fireman's Fund Ins. Co. v. Int'l Market Place*, 773 F.2d 1068, 1069 (9th Cir. 1985) (citing 1B J. Moore, Federal Practice ¶ 0.416[2], at 518 (2d ed. 1984)).

B. Bivens Claim

Garate and Sosa offer four arguments in support of dismissal of the *Bivens* claim: (1) they are qualifiedly immune from suit; (2) the claim is barred by the statute of limitations; (3) the Fourth and Fifth Amendments do not apply to nonresident aliens outside of the United States; and (4) even if the Amendments do apply abroad, "special factors counselling hesitation" preclude recognition of a cause of action.

1. Qualified Immunity

As discussed in section II above, the Court presently cannot determine whether Garate and Sosa acted as independent contractors or employees of the government. If they fall into the former category they are not entitled to the protection of qualified immunity.

It is clearly established in this circuit that "the private status of the defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action." *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987). A defendant acts under color of federal law if he or she engages in joint action with governmental agents or if he or she exercises powers traditionally reserved to the state. *Id.* at n.17. Although private parties may be liable under *Bivens*, they are not entitled to qualified immunity. *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989); *How-*

erton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983). While at least one court of appeals has taken the position that private parties can claim immunity if they can be considered functionally governmental employees, *Frazier v. Bailey*, 957 F.2d 920, 928 (1st Cir. 1992), the *F.E. Trotter* court adopted a broad categorical approach based on the public or private status of the defendant.

The Ninth Circuit position is supported by the Supreme Court's decision that private defendants charged under 42 U.S.C. § 1983 for invoking state replevin, garnishment and attachment statutes later declared unconstitutional are not entitled to qualified immunity. *Wyatt v. Cole*, 112 S. Ct. 1827 (1992). The Court noted that unlike public officials, private parties "hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. . . . In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." 112 S. Ct. at 1833-34. As one court of appeals observed, the *Wyatt* analysis does not bode well for the continued vitality of decisions affording qualified immunity to private parties. *Burrell v. Bd. of Trustees of Georgia Military College*, 970 F.2d 785, 794-95 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993).

2. Statute of Limitations

Garate and Sosa assert that the *Bivens* claim is time-barred since the alleged constitutional torts occurred more than one year prior to the institution of this action.

The statute of limitations for *Bivens* claims is the state personal injury statute. *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991). In California, the period is one year. Cal. Civ. Proc. Code § 340(3); *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993).[13] Prior

[13] In his reply papers, Sosa maintains that the *Bivens* claim should be governed by the statute of limitations under Texas law,

to *Van Strum*, the applicable statute of limitations was the forum state's "catch-all" statute, which in California is four years. Cal. Civ. Proc. Code § 343; *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir. 1980). For actions accruing prior to the decision in *Van Strum*, the limitations period runs one year from the date of that decision or at the end of the previously applicable limitations period, whichever occurs sooner. *Van Strum*, 940 F.2d at 411. Accordingly, to the extent that the *Bivens* claim in this action accrued prior to March 5, 1991 (the date *Van Strum* was decided), the statute of limitations ran on March 5, 1992.

Alvarez argues that the statute of limitations was tolled during the period of his incarceration, i.e. from April 2, 1990 to December 14, 1992, pursuant to California Code of Civil Procedure § 352.[14] State tolling statutes such as § 352 apply to *Bivens* claims as well as claims under 42 U.S.C. § 1983. *See Hardin v. Straub*, 490 U.S. 536, 543-44 (1989); *Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994); *Lewellen v. Morley*, 875 F.2d 118, 120 (7th Cir. 1989). Thus, the Court finds that Alvarez's *Bivens* claim was tolled until December 14, 1992. He filed the Complaint on July 9, 1993, well within the one-year limitations period.

Garate contends that, even if the claim was tolled until December 14, 1992, the statute ran as to him because he was not served until after January 31, 1994, when the First Amended Complaint was filed. This argument rests on an erroneous view of the effect of untimely service on the statute of limitations. Garate was named as a defendant in the Complaint. Since the Complaint was

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not California law. This contention is untimely and will not be considered herein.

[14] Section 352(a)(3) provides for tolling if the plaintiff, at the time his or her action accrued, was "[i]mprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life. . . ."

never formally dismissed as to Garate based on untimely service, *see* Fed.R.Civ.P. 4(m), the limitations period did not run after July 9, 1993. The First Amended Complaint superseded and related back to the Complaint. Fed. R.Civ.P. 15(c)(2).

Thus, the Court rejects all statute of limitations challenges to the *Bivens* claim.

3. Extraterritorial Application of the Fourth and Fifth Amendments

In section I.C.1 above, the Court determines that the extraterritorial application of the Fourth and Fifth Amendments was not clearly established at the time of the events underlying this action. Since Garate and Sosa are not, at least for now, entitled to qualified immunity, the Court must reach the question of whether Alvarez actually can claim the protection of the Amendments.[15]

The clear import of *Verdugo-Urquidez*, 494 U.S. 259, is that the Fourth Amendment does not apply abroad with

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[15] Cognizant of the principle that unnecessary interpretation of the Constitution should be avoided, the Court considered the defendants' argument that "special factors counselling hesitation in the absence of affirmative action by Congress" bar a *Bivens* action even in the event that the Fourth and Fifth Amendments apply abroad. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 420-23 (1988); *Bricker v. Rockwell Int'l Corp.*, 22 F.3d 871, 873-74 (9th Cir. 1993). There is some support for this contention. *See Verdugo-Urquidez*, 494 U.S. at 273-74 (suggesting that *Bivens* actions might be unavailable in cases involving extraterritorial law enforcement and military operations); *Reagan v. Sanchez-Espinoza*, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (declining to permit a *Bivens* claim against executive officials for support of insurgent forces in Nicaragua). However, the action before the Court arises from the seizure of a single person at the direction of United States law enforcement authorities. The Court is not persuaded that the recognition of a *Bivens* claim in this context would "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 273-74; *see id.* at 291-93 (Brennan, J., dissenting).

respect to aliens who have little attachment to this country. That *Verdugo-Urquidez* involved a search of a person's property and this case involves the seizure of a person makes no difference. For the reasons stated earlier, the Court believes that *Verdugo-Urquidez* also must be read as encompassing the Fifth Amendment substantive due process rights of persons in custody. If the Fourth Amendment does not protect a noncitizen of the United States in a foreign country from an unreasonable seizure, the Fifth cannot protect that person from physical mistreatment at the hands of his or her captors.

It is worth underscoring that the Court's conclusion as to the reach of Fifth Amendment substantive due process rests on the understanding that the mistreatment of Alvarez in Mexico was "fully accomplished" in that country. *See id.* at 264; *cf. Lamont*, 948 F.2d at 834 (holding that grants of government funds for the benefit of foreign sectarian institutions violated the Establishment Clause, if at all, in the United States). By comparison and hypothetically, an attempt by prosecutors to introduce a confession obtained in Mexico during Alvarez's criminal trial could have violated the Fifth Amendment privilege against self-incrimination, since that wrong would arise only at trial. *Verdugo-Urquidez*, 494 U.S. at 264.

Garate and Sosa may be liable under *Bivens* for violations of the Fourth and Fifth Amendments after Alvarez entered the territory of the United States. Accordingly, as is the case with defendants Berellez, Waters, Gruden and Lawn, the Court dismisses the *Bivens* claim as to Garate and Sosa only with respect to the alleged extraterritorial misconduct.

C. ATCA Claim

As discussed in the context of the United States' Motion to Substitute, see section II above, Garate and Sosa may be liable for violations of the ATCA if they were acting as independent contractors during the underlying

events. Since Garate and Sosa do not presently enjoy immunity under the Liability Reform Act, the Court must reach their additional arguments in support of dismissal of the ATCA claim. In particular, the defendants contend (1) that Alvarez cannot state an ATCA claim against them in their personal capacities because private actors cannot violate the law of nations, and (2) that any ATCA claim is time-barred by the same one-year statute of limitations that applies to *Bivens* claims.

1. Cognizability of Personal-Capacity Actions

Garate and Sosa are sued in their personal capacities. First Amd. Complt., paras. 10 and 11. Relying on the decision of the court of appeals in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), they argue that ATCA claims cannot be stated against private individuals as a matter of law.

In *Sanchez-Espinoza*, a panel of circuit judges, including future Supreme Court Justices Scalia and Ginsburg, considered an ATCA claim brought by citizens of Nicaragua and others based on United States support for rebel forces in Nicaragua, commonly known as the "Contras." The defendants included nine senior executive officials who were sued in their official and personal capacities. *Id.* at 204-05.

The court stated that the law of nations "does not reach private, non-state conduct" and thus concluded that the executive officials could not be held personally liable under the ATCA. *Id.* at 206-07. In support of this proposition, the court cited the concurring opinions of Judges Edwards and Bork in *Tel-Oren*, 726 F.2d 774. Judge Edwards rejected the contention that a private entity such as the Palestine Liberation Organization not acting under color of state authority could violate the law of nations by engaging in torture. *Id.* at 791-95. Judge Bork, though somewhat obliquely, also underscored the significance of private as opposed to state action. *Id.* at 807, 819.

Two deficiencies are apparent in *Sanchez-Espinoza*. First, in stating that the law of nations "requires action authorized by the sovereign as opposed to private wrongdoing," 770 F.2d at 207, the court glossed over a significant distinction alluded to by Judge Edwards in *Tel-Oren*: persons acting under color of law may be liable for violations of the law of nations. *Id.* at 793. The Ninth Circuit on two recent occasions has recognized this very point. *Estate I*, 978 F.2d at 501-02 (a person who acts "under official authority or under color of such authority may violate international law"); *Estate II*, 25 F.3d at 1472 n.8 (action within official mandate not a prerequisite for violation of international law). More importantly, *Sanchez-Espinoza* fails to recognize that government officers may be personally liable for actions taken in their official capacities. *See Hafer v. Melo*, 112 S. Ct. 358, 363 (1991).[16] Only personal immunity defenses are available to individual-capacity defendants, not sovereign immunity. *Id.* at 362. Of particular note, under the Liability Reform Act, which was enacted after *Sanchez-Espinoza*, federal employees acting within the course and scope of their employment are shielded from suit under the ATCA.

Since an individual who acts under color of law may violate the law of nations, and Alvarez may be able to prove that Garate and Sosa acted under color of United States and/or Mexican law, a personal-capacity ATCA claim may be stated against them.

2. *Statute of Limitations*

The ATCA contains no statute of limitations. When a federal statute provides a cause of action and includes no express limitations period, courts follow the period of the most analogous state statute if it is not inconsistent

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[16] Although *Hafer* discussed the distinction between official and personal capacity actions in the context of 42 U.S.C. § 1983, its analysis seems equally applicable to actions under *Bivens* or the ATCA.

with federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

Only one court has addressed the limitations period for claims under the ATCA. In *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), the court found that the closest analogy to the ATCA in state law is the common law personal injury action. *Id.* at 1547. The court then determined that 42 U.S.C. § 1983 provided the most analogous federal cause of action. *Id.* at 1547-48. Since § 1983 claims are governed by the forum state's personal injury limitations period, the court found no reason to look beyond state law for a limitations period. The court applied the statute of limitations for the forum state, which in California is one year. Cal. Civ. Proc. Code § 340(3).

The defendants contend that the Court should follow *Forti* and apply a one-year limitations period, while Alvarez asserts that the Court should apply a ten-year limitations period consistent with § 2(b) of the TVPA, 28 U.S.C. § 1350 Note. The debate is academic in this case because even if the one-year rule applies, Alvarez's ATCA claim was tolled during the period of his incarceration. *See supra*, section III.B.2. Therefore, the statute of limitations does not bar the ATCA claim.

D. TVPA Claim

Alvarez alleges that the Court has subject matter jurisdiction under the TVPA "over the claims against the Mexican nationals who actually kidnapped Plaintiff from his medical office and subjected him to torture." First Amd. Complt., para. 2. He defines "the kidnappers" as Sosa and the five unnamed defendants who were directly involved in the kidnapping. *Id.*, para. 11. In the torture claim, Alvarez asserts that "the kidnappers" who acted under color of Mexican law are liable under the TVPA. *Id.*, para. 27. From these allegations, it is clear that

only Sosa and the unnamed defendants are charged with violating the TVPA.

The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> > (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> >
> > (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA § 2(a), 28 U.S.C. § 1350 Note. The Act requires exhaustion of "adequate and available remedies" in the place where the conduct giving rise to the claim occurred. *Id.*, § 2(b). The statute of limitations is ten years. *Id.*, § 2(c).

Sosa advances three arguments in support of dismissal of the TVPA claim: (1) the Act does not apply to agents of the United States; (2) the Act does not apply retroactively; and (3) Alvarez fails to allege exhaustion of remedies in Mexico. The Court finds the second argument compelling.

The TVPA became effective on March 12, 1992 and the alleged torture occurred in April 1990. Whether the Act should be applied retroactively presents a question of first impression.

In the recent case of *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), the Supreme Court clarified the standard for determining whether a statute is to be given retroactive application. The Court reconciled two conflicting canons of statutory construction: (1) that courts should apply the laws currently in effect and (2) that

retroactivity is not favored in the law. *Id.* at 1496. The Court summarized the proper analysis as follows:

> the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 1505.

The TVPA does not specify whether it is to be applied to pre-enactment events and Alvarez does not argue that Congress clearly intended such a result. Rather, focusing on the second part of the *Landgraf* analysis, Alvarez asserts that the TVPA does not have retroactive effect.

The *Landgraf* court observed that "deciding when a statute operates 'retroactively' is not always a simple or mechanical test." *Id.* at 1498. The Court explained:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection be-

> tween the operation of the new rule and a relevant past event.

Id. at 1499 (citation and footnote omitted).

Landgraf also indicates that retroactivity analysis is facial: the question is not the change in legal consequences solely with respect to the parties before the court, though the impact on the parties may be illustrative. *See id.* at 1506 (discussing the impact of the compensatory damages provision of Civil Rights Act of 1991, both generally and with respect to the parties). This is because each provision of a statute must apply retroactively to all or to none.

Alvarez argues that the TVPA does not impair any rights because official torture has been condemned universally in the international law context for many years. *See Filartiga,* 630 F.2d at 881-83. He also contends that the TVPA does not increase the liability of torturers since the Act merely restates their pre-existing liability under the ATCA, 28 U.S.C. § 1350. Both the House and Senate reports state that "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATCA]." H.R. Rep. No. 367, 102d Cong. at 3, *reprinted in* 1992 U.S.C.C.A.N. 84; Sen. Rep. No. 249, 102d Cong., 1st Sess. at 4 (hereinafter "House Report" and "Senate Report"). A district court has observed that the TVPA "codifies the holding in *Filartiga* . . . which assumed subject matter jurisdiction over foreign individuals . . . in the case or torture in violation of international law under" the ATCA. *LaFontant v. Aristide,* 844 F. Supp. 128, 138 (E.D.N.Y. 1994).

While it is evident that the primary purpose of the TVPA was to create a clear statutory remedy for torture and extrajudicial killing as a complement to recovery under the ATCA, the Court finds that the TVPA alters

the legal consequence for these misdeeds in two respects. First, as discussed in section I.B.2 above, ATCA claims against federal employees acting in the course of their employment are subject to substitution under the Liability Reform Act. By comparison, federal employees may violate the TVPA if they act under color of foreign authority. TVPA § 2(a), 28 U.S.C. § 1350 Note.[17] It is readily apparent that torture violates the TVPA in addition to international law; thus, a claim under the TVPA falls within the Liability Reform Act's exception for federal statutory claims, 28 U.S.C. § 2679(b)(2)(B). Accordingly, while a federal employee is immune from liability for torture under the ATCA, he or she can be liable for torture under the TVPA.

A second feature of the TVPA that represents a departure from actions under the ATCA is that all persons have standing to sue, regardless of citizenship status. Both the House and Senate noted that the TVPA would "enhance the remedy already available to under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a remedy also to U.S. citizens who may have been tortured abroad."

It might be argued that the TVPA's ten-year statute of limitations also renders the Act retroactive in nature. As discussed earlier, one court has held that the statute of limitations under the ATCA is the limitations period of the forum state for personal injury actions, which in California is one year. *Forti*, 672 F. Supp. at 1548-49.

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[17] In his signing statement, President Bush expressed his belief that the TVPA "does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions." 1992 U.S.C.C.A.N. 84, 92. However, the plain text of the TVPA as well as the House and Senate Committee Reports do not preclude the possibility that a United States employee may violate the Act by operating within the scope of his or her authority *and* under color of law of a foreign sovereign.

Hence, torts time-barred under the ATCA might be actionable under the TVPA. However, the Ninth Circuit has endorsed the principle that "since a statute of limitations is procedural in nature, it is accorded retroactive effect because it does not affect substantive rights." *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991). *Landgraf* is consistent with this approach: the Court stated that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." 114 S. Ct. at 1502. This is because rules of procedure "regulate secondary rather than primary conduct." *Id.* Thus, at least under the circumstances of this case,[18] the limitations period of the TVPA does not militate against its retroactive application.

Although torture and extrajudicial killing are egregious, deeply-rooted violations of international law, *Estate II*, 25 F.3d at 1475, *Landgraf* requires assessment of changes in the legal consequences of past acts, however wrongful they may be. Since the TVPA significantly expands liability in the courts of the United States, the Court must find that the Act has retroactive effect. Hence, in the absence of clear congressional intent, retrospective application of the Act is impermissible. The TVPA claim must be dismissed.

IV. Motion to Dismiss on Behalf of the United States

The scope of this motion is quite limited. The United States argues (1) that all but one of the claims under the FTCA are time-barred and (2) that the remaining claim,

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[18] The Ninth Circuit stated that a statute of limitations should not be applied retroactively if to do so would revive a stale claim. *New Hampshire Ins. Co.*, 953 F.2d at 487. *Landgraf* also acknowledged that new procedural rules are not applicable in every pending case. 114 S. Ct. at 1502 n.29. In this case, the Court has found that Alvarez's torture claim is not time-barred under the ATCA, so the longer limitations period of the TVPA does not impact Sosa. *See supra*, section III.C.2.

for prolonged arbitrary detention, is barred by the doctrine of judicial immunity since Judge Rafeedie made the determination to retain Alvarez in custody.[19]

A. The Statute of Limitations

Pursuant to 28 U.S.C. § 2401(b), a tort claim against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues. . . ." The limitations period "must be strictly observed." *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968). Nonetheless, dismissal based on the statute of limitations is proper "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Vaughn v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)).

The general rule is that a tort claim accrues when the plaintiff is injured, but "[i]n certain cases, usually involving medical malpractice or hidden injuries, the claim does not accrue until the plaintiff knows or in the exercise of reasonable diligence should know of both the injury and its cause." *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984). Even the when so-called discovery rule is applicable, knowing the cause of one's injury does not require knowledge of who is responsible for causing it; ignorance of the involvement of agents of the United States is irrelevant. *Id.* at 486-87.

Alvarez was abducted on April 2, 1990. Except for his continuing incarceration and a charge that the govern-

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[19] In a footnote in its memorandum of points and authorities, as an aside, the United States asserts that it is not liable under *Bivens* and that it is immune with respect to claims based on Mexican and international law pursuant to 28 U.S.C. § 2680(k), the FTCA exception for "[a]ny claim arising in a foreign country." Those arguments are not squarely presented and will not be discussed here.

ment withheld certain exculpatory evidence, he alleges no wrong after his arrival in Los Angeles on April 10, 1990. He was released on December 14, 1992. On July 9, 1993, he filed his administrative tort claim. Thus, all of his FTCA claims that accrued before July 9, 1991 and were not tolled are time-barred.

The government concedes that the claim for prolonged arbitrary detention (the fourth cause of action) "falls . . . partly within the two-year limitations period." Alvarez offers several theories as to why the remaining claims are not barred by the statute. First, he argues that since there was a single scheme by the government to violate his rights the Court should apply the continuing wrong doctrine and find that all of his claims accrued on the date of his release, December 14, 1992. Second, he contends that his kidnapping and false imprisonment claims accrued on the date of his release. Third, he invokes the blameless ignorance rule of discovery on the theory that the full scope of the government's misconduct was not revealed until trial. Fourth, he urges the Court to apply equitable tolling to his claims because he was not in a position to file an administrative tort claim while incarcerated in Los Angeles.

Though it appears that the statute of limitations poses a serious problem for Alvarez, the Court cannot be certain that the statute is insurmountable. Since discovery may strengthen his position, the Court will not now find his claims time-barred.[20]

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[20] The Court does note that neither party has cited what appears to be controlling authority in this circuit as to the accrual of false arrest and imprisonment claims. The general rule is that such claims accrue at the time of arrest or imprisonment, not release. *See Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993) (false arrest); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983) (false arrest); *Johnson v. Spalding*, 669 F.2d 589 (9th Cir. 1982) (false imprisonment), *cert. denied*, 459 U.S. 942 (1982); *Cline v. Brusett*, 661 F.2d 108, 111 (9th Cir. 1981) (false imprison-

B. Prolonged Arbitrary Detention Claim

Alvarez's claim for prolonged arbitrary detention is based on international law. First Amd. Complt., para. 35; *see Forti,* 672 F. Supp. at 1541-42. Under the FTCA, the United States is liable in tort for the acts or omissions of its employees to the extent that a private person would be liable to the claimant under the law of the state where the act or omission occurred. 28 U.S.C. § 1346(b). For purposes of this motion, the United States assumes that prolonged arbitrary detention is cognizable under the FTCA.

Judge Rafeedie held four bail hearings during the period that Alvarez was incarcerated. On April 10, 1990 and August 24, 1990, the Judge ordered detention without bail. After a third hearing on December 16, 1991, Judge Rafeedie set bail at $10 million and declined to reduce that amount after a fourth hearing on February 3, 1992. Alvarez did not post bail and was not released until his acquittal on December 14, 1992.

Judicial immunity provides an absolute bar to tort claims against judicial officers arising from judicial acts unless jurisdiction is clearly absent. *Mireless v. Waco,* 112 S. Ct. 286 (1991); *Forrester v. White,* 484 U.S. 219 (1988); *Dennis v. Sparks,* 449 U.S. 24 (1980); *Stump v. Sparkman,* 435 U.S. 349 (1978). It is beyond dispute that Judge Rafeedie is immunized from personal liability for his bail decisions. To the extent that Alvarez's detention was a judicial act, the United States also is entitled to immunity. Under the FTCA, the United States is "entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been

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ment); *see also Cooper v. Franchise Tax Bd.,* 661 F. Supp. 60, 61 (N.D. Cal. 1987) (false arrest). An exception exists where the gravamen of the plaintiff's claim is denial of a fair trial resulting in wrongful conviction and imprisonment. *Venegas,* 704 F.2d at 1146.

available to the employee of the United States whose act or omission gave rise to the claim." 28 U.S.C. § 2674.

In his opposition, Alvarez contends that the liability of the United States may be based on the acts of its prosecutorial representatives. Indeed, the government could have dismissed the indictment voluntarily at any time and allowed Alvarez to return to Mexico. However, the decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune. 28 U.S.C. § 2680(a); *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983); *cf.* 28 U.S.C. § 2680(h) (claims of false imprisonment, malicious prosecution, etc., based on acts of investigative or law enforcement officers are actionable). Thus, the United States cannot be liable for its policy decision to bring Alvarez to trial.

Since there is no basis for liability, the prolonged arbitrary detention claim against the United States is dismissed.

CONCLUSION

In accord with the foregoing discussion, the Court summarizes its rulings as follows:

The Motion to Dismiss on Behalf of the Individual Federal Defendants is GRANTED IN PART. The United States is substituted for defendants Berellez, Waters, Gruden and Lawn on all but the *Bivens* claim (the fifth claim for relief), and the defendants are granted qualified immunity on the *Bivens* claim with respect to the alleged mistreatment of Alvarez prior to his arrival in the United States.

The United States' Motion to Substitute Itself on All Claims Against Defendants Garate-Bustamante and Sosa Except the Constitutional Claims is DENIED without prejudice. Alvarez is entitled to discovery on the relationships between the United States and Garate and Sosa.

The motions to dismiss of Garate and Sosa are GRANTED IN PART. Alvarez fails to state a claim under *Bivens* insofar as he complains of events occurring in Mexico since he was not vested with Fourth or Fifth Amendment rights while outside of the United States. The TVPA claim is dismissed because the Act does not apply to events antedating its enactment.

The Motion to Dismiss on Behalf of the United States is GRANTED IN PART. The United States is immune from suit with respect to the claim for prolonged arbitrary detention.

IT IS SO ORDERED.

Dated: Aug. 30, 1994

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX D

PUBLIC LAW 100-694 [H.R. 4612]; November 18, 1988

FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT OF 1988

For Legislative History of Act, see p. 5945.

An Act to amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES

(a) FINDINGS.—The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE.—It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after "executive departments," the following: "the judicial and legislative branches,".

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial peti-

tion the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

> "(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> "(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. EFFECTIVE DATE.

(a) GENERAL RULE.—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY TO PROCEEDINGS.—The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

(c) PENDING STATE PROCEEDINGS.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

(d) CLAIMS ACCRUING BEFORE ENACTMENT.—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

SEC. 9. TENNESSEE VALLEY AUTHORITY.

(a) EXLUSIVENESS OF REMEDY.—(1) An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of this office or employment is exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages for a violation of the Constitution of the United States.

(b) REPRESENTATION AND REMOVAL.—(1) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding heretofore or hereafter commenced upon such claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831C(b) and the Tennessee Valley Authority shall be substituted as the party defendant.

(2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing

the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be substituted as the party defendant. A copy of the petition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the Untied States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(c) RETENTION OF DEFENSES.—Section 2674 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

"With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.".

Approved November 18, 1988.

No. 96-298

Supreme Court U.S.
FILED
OCT 21 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual defendant may take an immediate interlocutory appeal of the trial court's denial of the defendant's motion to dismiss, Fed. R. Civ. Proc. 12(b), in a Bivens suit where the motion was denied on the ground that the trial court cannot determine, without discovery, whether the defendant is a government employee entitled to qualified immunity, and where the plaintiff intends to amend his complaint to allege constitutional violations with more particularity.

2. Whether an individual defendant may take an immediate interlocutory appeal of the trial court's denial of the defendant's motion to substitute the United States for the individual defendant under the Liability Reform Act where the motion is denied on the ground that issues of fact exist as to the defendant's relationship with the United States, necessitating discovery before substitution can be finally granted or denied.

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No. 96-298

In The Supreme Court
OF THE
United States

October Term, 1996

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition For Writ of Certiorari To The
United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the Petition for a Writ of Certiorari in this case filed by petitioners Francisco Sosa and Antonio Garate-Bustamante.

STATEMENT OF THE CASE

Respondent Humberto Alvarez-Machain alleges in his complaint in this action that he was abducted from his home in Mexico, tortured, and forcibly brought to the United States by agents of the United States government to stand trial for the murder of Drug Enforcement Administration (hereinafter "DEA") Special Agent Enrique Camarena Salazar, a charge upon which, after more than two years of pre-trial detention in the United States, respondent was acquitted of. The facts are set out in more detail by the trial court in its memorandum opinion, see Pet. for Cert. App. C, and are summarized here.[1]

A. The Abduction and Torture

Respondent is an obstetrician in Guadalajara. In early 1990, defendant and DEA Special Agent Hector Berellez told petitioner Antonio Garate Bustamante (hereinafter "Garate"), a Mexican citizen, that the DEA would pay $50,000 plus expenses for the delivery of respondent to the DEA in the United States.

On April 2, 1990, respondent was abducted at gunpoint at his medical offices. He was then punched in the stomach, subjected to electric shocks, and twice injected with an unknown substance that made him light-headed and dizzy. His life and the safety of his family was threatened. One of the abductors was petitioner Francisco Sosa (hereinafter "Sosa"), a Mexican citizen.

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[1]As no discovery has yet taken place and this Petition arises from a motion to dismiss and a motion to substitute, all facts are viewed in the light most favorable to the respondent.

Respondent was then transported by private plane to El Paso, where he arrived on April 3. Berellez, Garate, and others met respondent on the runway and took him into custody. The abductors remained on the plane, and one declared "[w]e are Mexican Police. Here is your fugitive." Respondent was taken to another location and interrogated; he was deprived of food and subjected to verbal threats during this period.

On April 4, respondent complained of chest pains and received medical treatment in El Paso. On April 10, respondent was transported to Los Angeles for arraignment.

On December 14, 1992, the district court granted respondent's motion for acquittal on all charges, on the ground that the government had insufficient evidence to support a guilty verdict.[2]

B. This Action

On July 9, 1993, respondent initiated this action. Respondent seeks damages for the defendants' conduct

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[2]The district court had earlier granted a motion to dismiss the criminal case against Alvarez (later reversed by this Court) on the ground that the United States' actions violated the Extradition Treaty between the United States and Mexico. United States v. Caro-Quintero, 745 F. Supp. 599, 614 (C.D. Cal. 1990), aff'd sub nom. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev'd., 119 L. Ed. 2d 441 (1992). In so holding, the district court found the Mexican abductors were "paid agents" of the United States. *Id.* at 609. The United States did not contest this characterization. The district court made no finding, however, as to whether the abductors were government employees. See Pet. for Cert. 28a.

under various constitutional and tort theories. The defendants immediately moved for dismissal of all claims under Fed. R. Civ. Proc. 12(b), on grounds of lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim under which relief could be granted. The trial court granted the motions in part and denied them in part.

The bulk of the trial court's memorandum opinion is not before this Court; however, the two holdings that are before this Court will be set out in more detail.

1. **Qualified Immunity Issue.** Respondent's claims against Petitioners include several Bivens claims for damages based on constitutional violations. Petitioners moved to dismiss these claims on the basis of qualified immunity. The trial court denied the motion. The trial court held that it was unable to determine whether petitioners were employees of the government who were entitled to claim qualified immunity without discovery as to the relationship between petitioners and the government. Pet. for Cert. 33a-34a. Therefore, granting a motion to dismiss before discovery would have been premature.

2. **Liability Reform Act Issue.** Petitioners and defendant the United States (not a party to this proceeding) moved to substitute the United States for respondents on all claims with the exception of the constitutional claims made by respondent pursuant to the four Liability Reform Act and Tort Compensation of 1988 ("Liability Reform Act"). The Liability Reform Act allows this where the defendants were employees of the government acting within the scope of their employment. The trial court denied the motion, on the ground that discovery would be required to determine

the relationship between petitioners and the government. Pet. for Cert. 26a-30a.

The district court did not reach the issue of whether defendants Garate-Bustamante or Sosa were acting within the scope of their authority under 28 U.S.C. § 2679(d). Pet. for Cert. 54a. This issue would remain for decision even if defendants were found to be government employees eligible for the benefits of substitution under the Liability Reform Act.

C. Petitioners' Appeal

Petitioners filed an interlocutory appeal.[3] After petitioners served their opening briefs, respondent moved the court of appeal to dismiss the appeals on the ground that they were not appeals of final orders as required for appellate jurisdiction under 28 U.S.C. § 1291, and on the ground that defendants, as private individuals and not federal employees, had no right to an interlocutory appeal. Respondent relied in part on Johnson v. Jones, 132 L. Ed. 2d 238 (1995). The motion to dismiss was granted by the court of appeals in December 1995. Pet for Cert. 2a

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[3]After the memorandum opinion was issued, the trial court issued a stay of proceedings that has prevented respondent from conducting discovery or amending his complaint. All of the individual defendants filed interlocutory appeals. The United States and respondent were given permission to seek discretionary interlocutory appeals on certain issues. Respondent indicated to the district court that he intended to move for leave to amend his complaint upon lifting of the stay.

Petitioners moved for reconsideration, arguing that the dismissal of the appeals was erroneous under Behrens v. Pelletier, 133 L. Ed. 2d 773 (1996). The Court denied petitioners' motion. The issue presented by this Petition is whether the trial court's denials of petitioners' motions to dismiss and to substitute are immediately appealable by these petitioners under this Court's precedents.

D. The Court of Appeals Opinion

On September 24, 1996, the court of appeals ruled on the pending appeals brought by the United States, defendants, Berellez, Waters, Gruden, and Lawn, and respondent. The court affirmed the trial court's ruling in all respects other than the trial court's holding regarding the Torture Victim Protection Act, 28 U.S.C. § 1350 (hereinafter "TVPA"). The court of appeals found the TVPA applied retroactively to events before its enactment. See Alvarez-Machain v. United States, No. 95-55464 slip op. (9th Cir. Sep. 24, 1996).[4] In particular, the court of appeals ruled against defendants Berellez, Lawn, Gruden and Waters on the same qualified immunity issue defendants Garate-Bustamante and Sosa seek to raise in their interlocutory appeals. Appendix, at 11a-12a.

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[4]The court of appeals' opinion is included as Appendix A to this Brief in Opposition.

REASONS FOR DENYING THE WRIT

A. This Court Should Not Grant Certiorari on the Liability Reform Act Issue Because The Court of Appeals' Decision Was Correct on the Merits, No Conflict of the Circuits Exists, and the Issue Has Not Yet Been Fully Considered by the Courts of Appeals in Light of Behrens and Johnson.

The court of appeals' decision on the appealability of the Liability Reform Act ruling was correct on the merits. The trial court's order was not final under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (holding only final, collateral orders are immediately appealable). Defendants will have an opportunity to renew their motions after discovery takes place and a final decision is made by the district court on this issue.

Further, substitution does not alleviate the petitioners from the burdens of a lawsuit the way qualified immunity does. Rather, petitioners will still be subject to discovery and trial burdens, only with the threat of liability shifted to the United States. Thus, petitioners' analysis, Pet. for Cert. 13-15, is incorrect. Granting an appeal now and even reversing the trial court's order regarding the Liability Reform Act would not in any way shield the petitioners from the burdens of a lawsuit.

Petitioners operate from the assumption that the Liability Reform Act is subject to the same appeal principles as qualified immunity orders. This Court has never so held. Qualified immunity protects the interest in a defendant in avoiding the burdens of a lawsuit, not simply avoiding liability. See, e.g., Siegert v. Gilley, 500 U.S. 226, 232 (1991). Conversely, substitution does not

protect a defendant from suit but simply shifts liability to the government. The weight of the interest in early determination of a liability-shifting, rather than immunity, issue does not outweigh the strong interests against piecemeal appeals.[5]

The courts of appeals have consistently held, following the lead of this Court in Johnson, that denials of substitution under the Liability Reform Act are not immediately appealable where, as here, the trial court has simply denied the motion pending further limited discovery and an evidentiary hearing. In addition to the Ninth Circuit's order in this case, in Schrob v. Catterson, 967 F.2d 929, 939 (3d Cir. 1992), the Third Circuit held that such an order was not a final order under Mitchell v. Forsyth, 472 U.S. 511 (1985), and Cohen where the motion was "denied without prejudice because of unresolved issues of fact...." Id. (emphasis in original).

Similarly, in Jamison v. Wiley, 14 F.3d 222, 230 (4th Cir. 1994), an order denying substitution "which plainly holds open the prospect of reconsideration and alteration by the district court itself" was held not appealable under Cohen.

Arthur v. United States, 45 F.3d 292, 296 (9th Cir. 1995) also holds that orders denying substitution are only immediately appealable where there will be no opportunity for an evidentiary hearing by the trial court to determine

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[5]Even assuming the applicability of the qualified immunity cases, petitioners have not yet established their status as employees of the government. Pet. for Cert. 30a. Petitioners are not therefore entitled to an interlocutory appeal until they establish their status as employees.

the issue before trial. Thus, Arthur is consistent with the unanimous rule of the circuits that the trial court's order in this case, a denial of substitution without prejudice for purposes of allowing discovery, is not immediately appealable.

Petitioners' argument that the aforementioned cases somehow conflict with Mitchell and Behrens, Pet. for Cert. 12, is incorrect. The lower court decisions all came after Mitchell, and two of them cite Mitchell. This Court's decision in Behrens does not change Mitchell's rule as to when an order is appealable. See Behrens, 133 L. Ed. 2d at 786 (restating the rule in Mitchell).

Further, to the extent that Johnson or Behrens do reflect a change in the law, there has been no published opinion by any court of appeals on the Liability Reform Act appealability issue since Johnson was decided. Therefore, for this Court to grant this Petition would be premature.

B. This Court Should Not Grant Certiorari on the Qualified Immunity Issue Because Petitioners' Appeal Is Moot, Respondent Intends to Amend His Complaint, and There Is No Conflict of the Circuits on the Issue of Whether an Order Denying Qualified Immunity to a Private Party Is Immediately Appealable Under Johnson.

The court of appeals' recent affirmance of the trial court's memorandum opinion in relevant part moots petitioners' Appeals. The court held that defendants Berellez, Waters, Gruden, and Lawn were not entitled to dismissal on qualified immunity grounds based on the three "potential constitutional violations" that occurred in the

United States, as they constituted violations of clearly established law. Appendix, at 11a. Based on this ruling, petitioners are not entitled to qualified immunity for events occurring in the United States.

Petitioners, therefore, are asking this Court for a advisory opinion on the relationship between Behrens and Johnson that will, if a reversal is procured, simply result in a denial of their appeals on the merits. the Petition should therefore be denied based on the absence of a live controversy

In addition, respondent intends to amend his complaint. The appealability of the denial of a motion to dismiss where the pleadings are not completely set is a different issue from the issue petitioners argue. In Behrens, this Court noted that the appealable motion to dismiss order in that case involved a screening of "the defendant's conduct *as alleged in the complaint*" for objective legal reasonableness. Behrens, 133 L. Ed. 2d at 785 (emphasis in original). Since respondent will have an opportunity to amend his complaint, the district court's order denying qualified immunity at this stage does not finally resolve the legal issues defendants seek to resolve on appeal.

The only court that has confronted the issue of whether the denial of a motion to dismiss on the ground of qualified immunity to a private party is immediately appealable after this Court's decisions in Johnson has held such denials non-appealable.

In Rambo v. Daley, 68 F.3d 203, 206 (7th Cir. 1995), the court held that "[a]s Johnson clarified, Mitchell permits interlocutory appeals only where the defendant is

a public official asserting a defense of qualified immunity. Defendants cannot assert a defense of qualified immunity, thereby invoking our jurisdiction under Mitchell, by claiming that they acted as private citizens." Id. (emphasis added).

The distinction suggested in Rambo is correct, as it comports with the policy of Cohen. An order resolving the threshold issue of whether the defendants are eligible for qualified immunity does not "finally determine [a] claim[] of right" under Cohen. 337 U.S. at 546. Rather, even if the trial court had determined that defendants were eligible for qualified immunity protection, the Court still would have had to resolve whether defendants were actually protected, that is, whether they violated clearly established law. Such an order is not final and appealable.[6]

Further, the uncertain employment status of petitioners makes this case an imperfect case for certiorari on this issue. The district court has simply denied petitioners' motion pending a determination whether petitioners are employees entitled to raise a qualified immunity defense. All defendants who wish to raise

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[6]Petitioners' footnote arguing for pendent appellate jurisdiction over its Liability Reform Act appeal, Pet. for Cert. at 14 n. 8, is at the least premature. Petitioners have failed to secure jurisdiction over their qualified immunity claims and therefore have no hook to hang their Liability Reform Act claims. In any event, no pendent appellate jurisdiction would be available in this case, as the two questions turn on different law and different issues, and are therefore not inextricably intertwined as is required at a minimum for pendent appellate jurisdiction to arise. See Swint v. Chambers County Comm'n, 131 L. Ed. 2d 60, 75 (1995); Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 678 (D.C. Cir. 1996).

qualified immunity must make a threshold showing that they are in the class of litigants who are entitled to it, i.e., government employees. See Wyatt v. Cole, 504 U.S. 158 (1992). Thus, the burden of showing one's relationship to the government is not one the defendant is shielded from even if entitled to qualified immunity.

This case arises in a different context than the cases cited by petitioners. In all of those cases, the denial of the defendants' motion to dismiss was based on either of the two prongs of the qualified immunity test-- whether the law was clearly established and whether the defendant's conduct was violative of clearly established law. Petitioners' appeal is on the issue of whether petitioners, as persons who may be private parties, may claim the benefit of qualified immunity after this Court's decision in Wyatt v. Cole, 504 U.S. 158 (1992). The cases cited by petitioners involve government officials. They are thus distinguishable, as there is no question that government officials have the right to assert the defense and therefore invoke the jurisdiction of the court of appeals, as long as they do so consistent with the dictates of Johnson.

Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1401 (5th Cir. 1996), involved school official defendants who were explicitly held to be state actors in the court's opinion. Id. at 1406. The Fifth Circuit has also granted *en banc* review and is reconsidering the Doe decision. Pet. for Cert. 17.

Other cases cited by petitioners are distinguishable on other grounds as well. Cotrell v. Caldwell, 85 F.3d 1480, 1485 (11th Cir. 1986), and Finelli v. Tabb, 67 F.3d 67, 69 (4th Cir. 1995), are summary judgment cases and

are irrelevant to the issue of whether a conflict in the circuits exists in the context of a motion to dismiss.

United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990), Hill v. City of New York, 45 F.3d 653, 659-90 (2d Cir. 1995), and Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995), are pre-Johnson cases and thus cannot be used to create a conflict of the circuits over the meaning of Johnson and Behrens. At any rate, Kaluczky asserts jurisdiction over a motion to dismiss on qualified immunity grounds "to the extent that the issue can be decided as a matter of law", 57 F.3d at 206, while Hill holds all such orders nonappealable, 45 F.3d at 663. Yonkers Bd. of Educ. is completely off point, dealing with Eleventh Amendment immunity. Thus, it is far from clear exactly what the law of the Second Circuit is, much less whether it conflicts with other circuits.

Schrob, in addition to being a pre-Johnson opinion, decides the issue of Liability Reform Act substitution; dicta in the opinion about qualified immunity was not necessary for the holding as the court there states that substitution presents a different issue from immunity. 967 F.2d at 939.

The court of appeals' dismissal of petitioners' qualified immunity appeals was correct on the merits. In this unique factual circumstance (an appeal from a denial of a motion to dismiss on the ground that the defendants had not yet established themselves as employees of the government), an interlocutory appeal would not resolve any issue with finality. A reversal would not ensure petitioners' entitlement to qualified immunity, and an affirmance would not doom it. In this unique situation, the trial court's order is clearly not final under Cohen.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 21, 1996

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMBERTO ALVAREZ-MACHAIN
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA,
Defendants.

and

HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN,
Defendants-Appellants.

No. 95-55464

D.C. No. CV93-04072-JGD

OPINION

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICAN, ET AL.,
Defendant-Appellant.

No. 95-55768

D.C. No. CV93-04072-JDG

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant,

and

FRANCISCO SOSA; ANTONIO GARATE-BUSTAMANTE,
Defendants-Appellees.

No. 95-56121

D.C. No. CV93-04072-JGD

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted July 8, 1996--Portland, Oregon

Filed September 24, 1996

Before: Alfred T. Goodwin and Mary M. Schroeder, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge Goodwin

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*Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

In April 1990 the United States Drug Enforcement Agency (DEA) orchestrated the abduction and torture of Dr. AlvarezMachain, a Mexican doctor, and transported him to the United States for prosecution for the murder of a DEA agent in Mexico. The criminal case ended when the district court granted a judgment of acquittal.

Alvarez-Machain returned to Mexico and filed this civil action against the United States and its agents under 42 U.S.C. S 1983 and other federal statutes. His claims included the violation of constitutional rights as well as ten torts, ranging from torture to false imprisonment. Defendants moved to dismiss the complaint, and the district court granted the motion in part and denied it in part.

The court dismissed the constitutional claims that were based upon activities occurring in Mexico. The court also dismissed a claim brought under the Torture Victim Protection Act (TVPA). The court refused to dismiss the tort claims as barred by the statute of limitations, and denied the motion based upon the defense of qualified immunity asserted by defendants accused of wrongful conduct within the United States. We affirm the district court in its judgment with respect to all claims other than the TVPA claim. The district court held that it could not apply the TVPA to defendant's actions because the TVPA was enacted subsequent to the pertinent events. Because we hold that application of the TVPA to past acts would not have a retroactive effect, we reverse the district court on this ruling.

FACTS

On April 2, 1990, a team of men alleged to be hired by DEA agents working in Mexico, abducted Dr. Alvarez-Machain from his office in Guadalajara. They blindfolded him, transported him to an unknown location, and proceeded to beat him and subject him to electrical shocks. His kidnappers injected him with unknown chemical substances causing nausea and dizziness, denied him food and water, and forced him to lie face down on the floor for a long period of time. His life was repeatedly threatened, as well as the safety of his family. After enduring this torment for several hours, he was delivered into the hands of the DEA in El Paso, Texas.

Defendant Antonio Garate-Bustamante coordinated and led the activities in Mexico, and defendant Francisco Sosa participated in the events. Both were working as the paid agents of the DEA, who undertook to bring Alvarez-Machain to the United States in order to prosecute him for his alleged role in the murder of DEA agent Enrique Camarena.

Once in El Paso, defendant Garate-Bustamante and several DEA agents interrogated Alvarez- Machain. The DEA agents threatened Alvarez- Machain during the interrogation, denied him food and adequate medical attention, and at one point forced him to stand naked and be photographed. In El Paso, the DEA processed Alvarez-Machain under an assumed name or names, despite knowing his true identity, frustrating efforts by his family members and the Mexican government to learn about his whereabouts.

On April 10, 1990, Alvarez-Machain was transferred to Los Angeles and arraigned on charges of murder before United States District Judge Edward Rafeedie. Subsequently, Judge Rafeedie dismissed the charges, concluding that the court lacked jurisdiction over Alvarez-Machain because his abduction violated the extradition treaty between the United States and Mexico. United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D. Cal. 1990), aff'd sub nom United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991). The Supreme Court reversed the decision, however, and AlvarezMachain was forced to stand trial. United States v. AlvarezMachain, 504 U.S. 655 (1992). As noted, the prosecution ended with a judgment of acquittal on December 14, 1992. After the acquittal, Judge Rafeedie revealed that the government had withheld potentially exculpatory evidence from the defense, in addition to failing to take him promptly before a magistrate after he reached United States territory under arrest.

In addition to the cases consolidated in this appeal, Alvarez-Machain filed an administrative claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. S 2401(b). He added the United States as a defendant in January, 1994, after the six-month waiting period required by statute had expired. Against all defendants he alleged claims for kidnapping; torture; cruel and inhuman and degrading treatment or punishment; prolonged arbitrary detention; assault and battery; false imprisonment; intentional infliction of emotional distress; false arrest; negligent employment of public employees and agents; negligent infliction of emotional distress; and violations of the Fourth, Fifth and Eighth Amendments to the United States Constitution. Against defendants

Garate-Bustamante and Sosa, Alvarez-Machain also alleged a claim under the Torture Victim Protection Act (TVPA).[1]

In dismissing the constitutional claims arising out of conduct in Mexico, the district court held that the United States Constitution does not protect Mexican nationals in Mexico from wrongs committed against them by United States government agents engaged in extraterritorial law enforcement. The district court allowed the action to proceed on conduct by DEA agents acting within the United States, however, holding that the alleged conduct, if proved, clearly violated established constitutional rights. Accordingly, as noted, the DEA agents who participated in the El Paso activities were denied dismissal on qualified immunity grounds, and they have appealed that ruling.

The court denied Defendants Garate- Bustamante's and Sosa's motions for dismissal as to all but the TVPA claim, holding that more discovery was necessary to determine the exact relationship between the Mexican defendants and the United States before a determination could be made as to whether the defense of qualified immunity was available, or whether the United States could be substituted as the defendant on the tort claims based on their conduct in the United States. As for the TVPA, the district court declined to apply it to claims of torture occurring prior to the enactment of the statute, and Alvarez-Machain appeals that ruling.

Finally, with regard to the United States, the district court denied its motion to dismiss the tort claims as barred by the statute of limitations. The court recognized that the statute of limitations raised a potential problem for

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[1]Codified in the statutory notes to 28 U.S.C. S 1350.

Alvarez-Machain, but believed more discovery might reveal a basis for equitable tolling of the statute because of the lengthy duration of the plaintiff's incarceration, including his being held incommunicado, and otherwise prevented from timely protecting his civil rights while defending the murder charges against him.

These rulings are the subject of the present interlocutory appeals.[2]

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[2]In no. 95-55768, the United States appeals the order denying its motion to dismiss the Federal Tort Claims Act causes of action.

In no. 95-55464, DEA defendants appeal the order denying their motion to dismiss the constitutional claims for actions taken in the United States.

In no. 95-56121, Alvarez-Machain appeals the dismissal of his constitutional claims for actions taken in Mexico, and the dismissal of his claims under the TVPA.

Garate-Bustamante and Sosa also appealed the orders pertaining to their motions for dismissal based on qualified immunity and their motions for substitution of the United States as defendant in the tort actions. These appeals were dismissed by this court pursuant to Johnson v. Jones, 115 S. Ct. 2151 (1995). Nos. 95-55467 and 95-55469.

DISCUSSION

I. Statute of Limitations--No. 95-55768

The government argues that Alvarez-Machain's FTCA claims are barred by the statute of limitations because he failed to file an administrative claim until July 1993--three years after his alleged abduction and torture.

The FTCA provides:

> A tort claim against the United States shall be for ever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

28 U.S.C. S 2401(b). The key question here is the date of accrual for Alvarez-Machain's claims.

Generally a claim accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, of both the injury and its cause. Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984). Here, Alvarez-Machain did not have a sufficient basis to bring his claims of false imprisonment, negligent infliction of emotional distress, and false arrest until the after he had successfully challenged the criminal charges facing him. Indeed, had he filed an administrative claim for these torts prior to obtaining his acquittal, the claim should have been dismissed as premature. Heck v. Humphrey, 114 S. Ct. 2364 (1994) (holding that civil claims which necessarily implicate the validity of criminal charges do not accrue until after one has succeeded in the criminal realm).

Alvarez-Machain's other tort claims do not necessarily implicate the validity of his criminal charges. Nonetheless, this is an appropriate case for the application of the doctrine of equitable tolling of the statute of limitations. In addition to the obvious reasons for its application to claims that could not have been brought prior to his acquittal, reasons of judicial economy counsel against splitting causes of action, and reasons of common decency counsel against using governmental immunity as a sword instead of a shield in this case.

Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. Irwin v. Dept. of Veteran Affairs, 498 U.S. 89, 95-95 (1990). Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.

> Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time.

Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), rev. on other grounds, 503 U.S. 429 (1992). See also Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995) (tolling the statute due to a lack of clarity in the law).

[1] Here, the circumstances of Alvarez-Machain's abduction and subsequent trial warrant the equitable tolling of the statute of limitations. Alvarez-Machain was incarcerated for over two years, facing criminal charges of the highest gravity in a foreign country whose language he did not understand. His life was at stake, and his case involved numerous, complex issues of first impression--several of which were ultimately decided by the United States Supreme Court. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655 (1992); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Moreover, as discussed, had he filed an administrative claim prior to obtaining an acquittal, many of his claims would have been dismissed because they necessarily implicated the validity of his criminal charges. Heck v. Humphrey, 114 S. Ct. 2364. Looking at the totality of these circumstances, we conclude that Alvarez-Machain's case constitutes that rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice. We affirm the denial of the government's motion based on the statute of limitations.

II. DEA Agents Qualified Immunity

[2] Pre-trial detainees possess a clearly established right to be free from punishment. Bell v. Wolfish, 441 U.S. 520, 53437 (1979). This right is located in the due process clause of the Fifth Amendment, but we borrow from Eighth Amendment principles in determining the care to be afforded pretrial detainees. Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). The Eighth Amendment "proscribes . . . sanctions that are 'so totally without penological justification that it results in the gratuitous infliction of suffering.' " Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (quoting Gregg v. Georgia, 428 U.S.

153, 183 (1976)). Convicted prisoners and pre-trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Id.

[3] The complaint here reveals that the DEA agent defendants "threatened" Alvarez-Machain during an interrogation session in El Paso on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false name, making it impossible for the United States government to respond to inquiries about his whereabouts from his family or the Mexican government; and denied him adequate medical attention. Each of these allegations, if proven, served to create an atmosphere of fear and isolation, imposing "gratuitous suffering" in violation of Hoptowit. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. Id. Accordingly, the district court did not err in denying defendants' motion to dismiss these claims.

III. Extraterritorial Application of the Fifth Amendment

[4] Alvarez-Machain argues that the district court erred in holding that the Fifth Amendment due process clause does not protect aliens from actions taken by the United States abroad. We find it unnecessary to reach this issue. The issue is precluded because, under the instruction of the Supreme Court, in his criminal prosecution, we have already held that the actions taken by United States government agents or their employees against Alvarez-Machain in Mexico did not violate due process. United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992) (on remand from the United States Supreme Court). There we stated, "Alvarez-Machain's main alternative argument is that the circumstances of his kidnapping were so shocking that the abduction constituted a denial of due

process. This contention similarly is not supported by the district court's findings." Id. at 311. This adverse finding in the criminal action bars Alvarez-Machain from pressing the issue again in the civil arena. Matthews v. Macanas, 990 F.2d 467 (9th Cir. 1993).

IV. Torture Victim Protection Act

Alvarez-Machain's complaint also included a claim against defendants Garate-Bustamante and Sosa under the Torture Victim Protection Act, signed into law on March 12, 1992. The law provides in pertinent part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation--(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual;. .. ." TVPA S 2 (a), codified in the statutory notes to 28 U.S.C. S 1350.

The district court dismissed the TVPA claim, holding that application of the TVPA to the allegations here would have an improper, retroactive effect. Alvarez-Machain argues that application here would not have a retroactive effect because defendants' had a legal duty to refrain from torture even prior to the TVPA's passage. The two other district courts to have considered the issue agreed with the argument advanced by Alvarez-Machain, see Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass 1995); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996), but it appears to be an issue of first impression for the Circuit courts.

[5] The Torture Victim Protection Act is silent with regard to whether Congress intended for it to apply retroactively. Absent clear Congressional intent, there exists a strong presumption against retroactivity. However,

not every application of a statute to events occurring before its enactment constitutes a "retroactive application." An application does not have a retroactive effect unless "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483, 1505 (1994). Courts regularly apply new statutes to past events when the intervening statute authorizes or affects the propriety of prospective relief; where the intervening statute confers or ousts jurisdiction; or when the intervening statute merely changes the procedural landscape. Id. at 1501-1502.

[6] The Torture Victim Protection Act does not impose new duties or liabilities on defendants. Torture has long been condemned and prohibited by international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Further, aliens have had the right to adjudicate torture claims in our federal courts since the passage of the Alien Tort Claim Act (ATCA) in 1789.[3]

Defendants attempt to distinguish the ATCA from the TVPA in three ways, but none warrant a holding that application of the TVPA to defendants' conduct would have a retroactive effect.

[7] First, defendants argue that the ATCA confers jurisdiction on federal courts to hear international law claims, but does not create a substantive, federal right like

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[3]The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. S 1350.

the TVPA. Defendants err in their description of the ATCA; we have previously held that the ATCA has a substantive as well as a jurisdictional component. In re Estate of Ferdinand Marcos, Human Rights Lit., 25 F.3d 1467 (9th Cir. 1994) (Marcos II), cert. denied 115 S.Ct. 934 (1995). Accord Xuncax, 886 F. Supp. 162; Cabiri, 921 F. Supp. 1189. In Marcos II we stated,

> in contrast to section 1331 "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985).

Id. at 1475. The court further explained, "International law does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions. [Internal quotation marks and citation omitted.]" Id. See also Filartiga, 630 F.2d 876 (holding that claims of torture could be adjudicated under the ATCA because torture constituted a violation of international law).

Our conclusion in Marcos II is supported by the legislative history of the TVPA.

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary

> Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

H.R. Rep. (Judiciary Committee) No. 367(I), 102nd Cong., 1st Sess. (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86; see also S. Rep. (Judiciary Committee) No. 249, 102nd Cong., 1st Sess. (1991).

[8] Second, defendants argue that the TVPA expands the class of plaintiffs able to bring claims for torture, and thus creates new duties. Where the ATCA allows only aliens to bring actions in U.S. courts for extraterritorial torture, the TVPA allows aliens and citizens to bring such claims. The defendants' distinction is without significance, however, because citizens have always been able to bring claims for extraterritorial torture in state courts under the transitory tort doctrine. The TVPA merely allows citizens now to bring those claims in federal court as well. There is no increase in duties or liabilities, and thus no retroactive effect.

Third, defendants argue that the TVPA increases liabilities by exposing a new class of defendants to personal liability. Under the ATCA, defendants maintain, individuals would not be held personally liable for acts of torture if, while acting under the color of foreign authority, they were also working within the scope of employment for the United States. In such cases, the United States would

be substituted as the defendant, and the individuals would escape personal liability. Because no substitution is allowed under the TVPA, defendants claim they are newly burdened with liability they did not have before 1992.

Defendants postulate a set of circumstances that are too remote to affect our retroactivity analysis. If courts were required to give weight to every hypothetical suggestion advanced by litigants, few statutes would survive the Landgraff test.

V. Conclusion

[9] The judgment of the district court is AFFIRMED insofar as it dismissed the constitutional claims arising out of harms suffered by the plaintiff in Mexico; we AFFIRM the denial of the government's defense based on the statute of limitations; and the denials of motions to dismiss on the basis of qualified immunity. We REVERSE the ruling that the TVPA claims were barred because application of the statute to events taking place prior to its enactment would have a retroactive effect. We REMAND the case to the district court for further proceedings.

The plaintiff is entitled to costs on appeal.

Supreme Court, U.S.
FILED
OCT 31 1996
OFFICE OF THE CLERK

No. 96-298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

Francisco Sosa and Antonio Garate-Bustamante respectfully submit this reply brief in support of their petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit dismissing their appeals for lack of jurisdiction.

I. WESTFALL ACT IMMUNITY PROVIDES IMMUNITY FROM SUIT, AND DOES NOT MERELY SHIFT LIABILITY

The Westfall Act immunizes federal employees from common law tort suits just as qualified immunity protects them from constitutional tort suits. To be effective, Westfall Act immunity must be protected by an immediate

right of appeal for the same reasons that qualified immunity warrants such protection.[1]

Respondent's argument that Westfall Act immunity "does not protect a defendant from suit but simply shifts liability to the government," Opp'n at 7-8, misstates the structure and operation of the Westfall Act. When a district court grants substitution to a federal employee under the Westfall Act, the individual defendant is dismissed from the suit, and the United States takes the employee's place as the party defendant. *See* App. to Pet. for Cert. 54a. The case then proceeds as a Federal Tort Claims Act suit, and becomes subject to the exhaustion of remedy and sovereign immunity defenses that are uniquely available to the United States. As a result, the individual no longer is a party to the case, and is insulated from further involvement in the litigation except, at most, as a witness. This protection from suit parallels that conferred by qualified immuniy, and should be treated similarly.

Respondent contends that Westfall Act immunity is not an immunity from suit because the employee may still be subject to some form of discovery and trial participation as a nonparty witness. This argument fails for several reasons, not the least of which is that this Court rejected such a restriction on immediate appeals last Term in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). In that case, the plaintiff argued that a qualified immunity-based immediate appeal should not be permitted when the defendant would face litigation on other claims regardless of the outcome of the appeal. This Court soundly rejected this argument, holding that the "right to immunity is a right to immunity *from certain claims*, not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit." *Id.* at 841.

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[1] Respondent counters this proposition by arguing that "[t]his Court has never so held." Opp'n at 7. The parallels between qualified immunity and Westfall Act immunity justify the grant of certiorari in this case to do exactly that.

The prospect that an individual might remain a *witness* in a lawsuit does not eliminate his right to appeal a decision forcing him to be a *defendant* in that suit. The Westfall Act is designed to immunize federal employees from the expense, risk, and exposure associated with defending a lawsuit, which is irrevocably lost if the individual is forced to proceed with discovery when, based on the Attorney General's certification and the allegations of the plaintiff's complaint, immediate substitution is appropriate. After substitution, the United States bears the burden of defending the case, and may very well win dismissal of the case entirely pursuant to its unique Federal Tort Claims Act defenses. Accordingly, both as a matter of law and of logic, petitioners' right to immediate review of the district court's substitution and qualified immunity rulings is unaffected by their status as potential witnesses in the continuing litigation against the United States.[2]

Respondent's argument that "an interlocutory appeal would not resolve any issue with finality," Opp'n at 13, is demonstrably wrong. The protections conferred by qualified immunity and Westfall Act immunity insulate defendants from the burdens of litigation, including discovery, as to those claims within their scope. Petitioners' position has been and continues to be that they are entitled to substitution and qualified immunity as a matter of law, based on the Attorney General's certification and respondent's own complaint. Were petitioners to prevail in their argument, the constitutional and common law claims would be dismissed. Under the principles of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Behrens*, the district court's ruling that petitioners must go forward

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[2] Respondent's position would similarly prohibit immediate appeals in § 1983 cases where a plaintiff sues an individual defendant and one or more government entities based on the same events. Because municipalities do not have qualified immunity, under respondent's theory no immediate appeal could be taken from a denial of qualified immunity to the individual because he likely would be a witness in the suit against the municipality. Such a result is clearly foreclosed by *Mitchell* and *Behrens*.

with discovery on those claims is a final decision for purposes of *Cohen*. Thus, contrary to respondent's suggestion, once petitioners' appeals are reinstated and resolved on their merits, the core claims in the case would indeed be resolved "with finality."

II. PETTTIONERS' QUALIFIED IMMUNITY APPEALS ARE NOT MOOT

The recent Ninth Circuit decision denying qualified immunity to different individual defendants in this case does not moot petitioners' appeals. Respondent's complaint charges those defendants—Berellez, Waters, Gruden, and Lawn—with unconstitutional conduct relating to the treatment of respondent after he reached the United States and was taken into custody by the DEA. The Ninth Circuit held that these allegations were sufficient to overcome the DEA defendants' qualified immunity defense at this stage of the case.

Petitioners' qualified immunity appeals are wholly separate from those resolved by the Ninth Circuit's ruling. Sosa, for example, is not alleged to have participated in any of the conduct that allegedly occurred when respondent was being questioned in El Paso, or at any other point during which respondent was held in custody in the United States. Petitioners argue in these appeals that respondent has not sufficiently alleged their personal participation in any unconstitutional conduct, and that nothing petitioners are alleged to have done violated respondent's clearly established rights. Petitioners' qualified immunity appeals are not moot.

III. RESPONDENT'S INTENTION TO SEEK LEAVE TO AMEND HIS COMPLAINT DOES NOT AFFECT APPELLATE JURISDICTION

Respondent's assumption that he will be given leave to amend his complaint does not deprive this Court of jurisdiction. As this Court explained just last Term, "*Mitchell* clearly establishes that an order rejecting the defense of

qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." *Behrens*, 116 S. Ct. at 839. A plaintiff should not be permitted to manipulate appellate jurisdiction by opposing a motion to dismiss in the district court, and then declaring an intention to amend his complaint after the defendants have appealed the denial of that motion. Such a rule would run directly counter to *Mitchell* and *Behrens*, which recognize that an immediate appeal is necessary to guard against improper denials of immunity, regardless of the stage at which the immunity defense is raised.

In any event, respondent might not be permitted to amend his complaint. Because respondent has already amended his complaint once, he may amend it again only by leave of court. Fed. R. Civ. P. 15(a). "There is no absolute or automatic right to amend," *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 224 (8th Cir. 1994), and depending on the resolution of petitioners' substitution and qualified immunity appeals, further amendment could be futile. The mere possibility that respondent will be permitted to amend his complaint has no effect on the jurisdiction of either this Court or the Ninth Circuit.

IV. THE CIRCUIT COURTS ARE DIVIDED ON THE QUESTION OF WHETHER A PRIVATE DEFENDANT WHO IS DENIED THE RIGHT TO RAISE A QUALIFIED IMMUNITY DEFENSE MAY TAKE AN IMMEDIATE APPEAL

Respondent recasts one of the issues presented by this petition as being whether a private defendant who is denied the right to raise a qualified immunity defense in a *Bivens* suit may take an immediate appeal from that ruling. In dismissing petitioners' appeals, the Ninth Circuit did not expressly adopt respondent's argument that petitioners had no right of immediate appeal because they were private parties. However, assuming that respondent

is correct that the Ninth Circuit dismissed petitioners' appeals because of their supposed private status, the circuit courts are deeply divided on that issue, providing an additional ground for granting certiorari.

Seven circuits have considered this issue in published opinions. Four permit immediate appeals by private individuals who have been denied the opportunity to raise an immunity defense. *See McKnight v. Rees*, 88 F.3d 417, 418 n.1 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3315 (U.S. Aug. 26, 1996) (No. 96-318); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446 & n.3, 1453 (4th Cir. 1996); *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 788 (11th Cir. 1992); *DeVargas v. Mason & Hangar-Silas Mason Co.*, 844 F.2d 714, 717 (10th Cir. 1988). Three circuits refuse to accept jurisdiction over such appeals. *See Felix de Santana v. Velez*, 956 F.2d 16, 19 (1st Cir. 1992);[3] *NF Indus., Inc. v. Export-Import Bank of the United States*, 846 F.2d 998, 1002 (5th Cir. 1988); *Chicago & North Western Transp. Co. v. Ulery*, 787 F.2d 1239, 1240-41 (8th Cir. 1986).[4]

In *Burrell*, the Eleventh Circuit recognized that an immediate appeal is essential to protect the potential immunity of a defendant who has been denied the opportunity even to raise a qualified immunity defense, just as it is for those whose qualified immunity defense has been considered and rejected. "If we have jurisdiction to determine whether a particular defendant generally eligible to raise qualified immunity may benefit from it in the particular case at hand, we surely have jurisdiction to determine

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[3] *See also Crippa v. Dukakis*, 905 F.2d 553, 556 (1st Cir. 1990); *Lovell v. One Bancorp*, 878 F.2d 10, 12 (1st Cir. 1989).

[4] The Ninth Circuit has held in an unpublished opinion that a defendant denied the right to assert a qualified immunity defense may not take an immediate appeal from that ruling. *See Penman v. Korper*, No. 91-15520, 1992 U.S. App. LEXIS 25810, at *3 (9th Cir. Oct. 8, 1992).

whether qualified immunity may shield that defendant as a general matter." *Burrell*, 970 F.2d at 788.

In contrast, the Eighth Circuit refuses to read *Mitchell* to permit an immediate appeal by a private defendant who has been denied the benefit of a qualified immunity defense. "[The *Mitchell*] rationale has no application in the instant case, where the defendants . . . are not public officials but private parties suable under 42 U.S.C. § 1983 only because they allegedly conspired with other persons acting under color of state law." *Ulery*, 787 F.2d at 1240-41.

Resolution of this conflict has taken on increased importance in light of the proliferation of governmental services being performed by private contractors. Those contractors are increasingly being sued in *Bivens* and § 1983 actions, and the circuits are split on whether and under what circumstances such parties are entitled to qualified immunity.[5] In light of this continuing uncertainty over the scope of qualified immunity protections, appellate jurisdiction over immediate appeals in such cases is essential, and cannot be left to turn on whether the defendant is sued in California or Florida. Regardless of whether qualified immunity ultimately protects defendants in these circumstances, the courts of appeals should have interlocutory jurisdiction under *Mitchell* to make that decision.[6]

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[5] *Compare McKnight*, 88 F.3d at 425 (denying qualified immunity to correctional officers employed by private corporation under contract with state) *with Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.) (extending qualified immunity to doctor employed by private corporation under contract with state to provide medical services at state correctional facilities), *cert. denied*, 116 S. Ct. 527 (1995).

[6] Respondent's reliance on *Rambo v. Daley*, 68 F.3d 203 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996), is sorely misplaced. In that case, it was the *defendants* who argued vigorously that they were acting strictly as nongovernmental private parties during the events in question, and therefore could not have acted under color of law for purposes of § 1983 liability. The Seventh Circuit quite understandably ruled that, in such a situation, qualified immunity

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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is not available as a defense, and so an immediate appeal is not permitted. *Rambo* has no relevance to situations where, as here, the defendants contend that they were performing governmental functions at the behest of public actors.

In addition, respondent inaccurately suggests that *Rambo* is the only post-*Johnson* appellate court decision to consider the appealability of a district court's refusal to permit a private party to raise a qualified immunity defense. *See* Opp'n at 10. In fact, *McKnight* specifically held that *Johnson* did not affect its jurisdiction to hear the appeal of privately employed correctional officers who had been denied the right to rely on a qualified immunity defense. *See* 88 F.3d at 418 n.1.